FILED
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JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

ONTARIO LAND COMPANY,
Plaintiff in Error,

vs.

JAY E. YORDY and MINNIE E. YORDY, his wife,
Defendants in Error.

No. 59.

IN ERROR TO SUPREME COURT, STATE OF WASHINGTON.

MOTION TO DISMISS

Under Rule 9

AND

BRIEF FOR DEFENDANTS IN ERROR

In support of said Motion.

BENJAMIN S. GROSSCUP,
For Defendants in Error.

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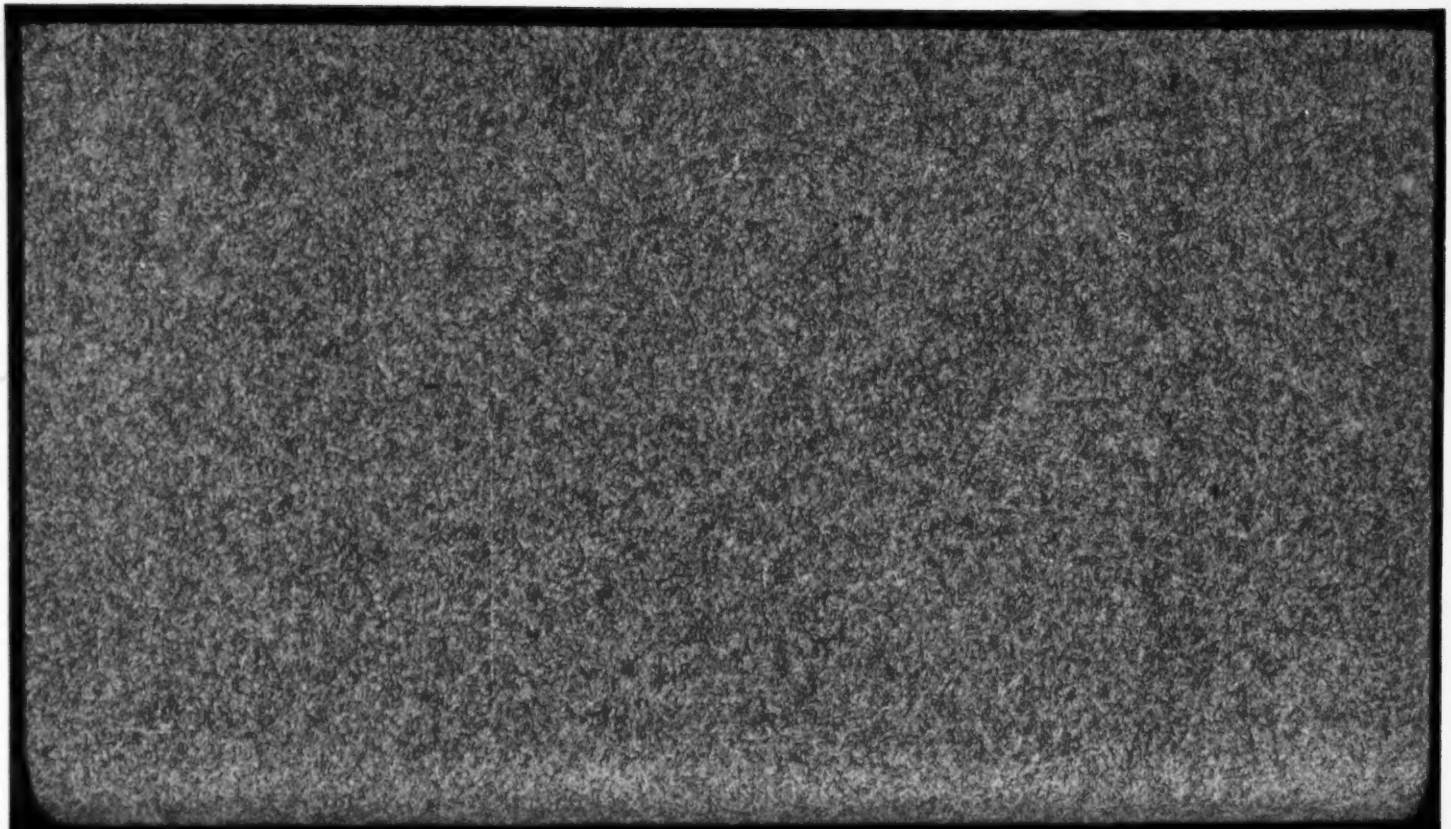

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ONTARIO LAND COMPANY,
Plaintiff in Error,

vs.

JAY E. YORDY and MINNIE E. YORDY, his wife,
Defendants in Error.

No. 277

MOTION TO DISMISS UNDER RULE 6,

Now come the defendants in error, Jay E. Yordy and Minnie E. Yordy, by their attorney, Benjamin S. Grosscup, and move that the writ of error herein be dismissed at the cost of the plaintiff in error, and for judgment in favor of the defendants in error and against the plaintiff in error, for costs.

This motion is made upon the following grounds:

1. Because it does not appear from the record in this cause that there is drawn in question the validity of a

statute of, or an authority exercised under, the United States.

2. Because it does not appear from the record in this cause that there is drawn in question the validity of a statute of, or an authority exercised under, the State of Washington, or any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States.

3. Because it does not appear from the record in this cause that any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or a commission held, or authority exercised, under the United States.

4. Because it does not appear that the judgment of the Supreme Court of the State of Washington, for the purpose of reviewing which this writ of error is taken, was based upon any federal question.

5. Because it does not appear from the record in this cause that any federal question was raised in, or presented to, the courts of the State of Washington, and because it does not appear from the record that the courts of the State of Washington, and particularly the Supreme Court of said state, was in any manner called upon or asked to consider any federal question.

In support of this motion the defendants in error refer to the transcript of record filed in this cause by the plaintiff in error, the briefs filed by the respective parties in the Supreme Court of the State of Washington, and

the brief filed by the plaintiff in error in the Supreme Court of Washington, in support of its petition for re-argument, a certified copy of which brief is herewith presented to the Court, and defendants in error ask that the same may be made a part of the transcript of the record in the Supreme Court of Washington.

BENJAMIN S. GROSSCUP,
Attorney for Defendants in Error.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR, IN SUPPORT OF THEIR MOTION TO DISMISS.

This case was commenced in March, 1905, by the plaintiff in error, as plaintiff, in the Superior Court of Washington, as a civil action, under the practice code of that state, in the form of an action of ejectment, to recover from the defendants in error, who were the defendants in the State court, possession of certain real estate in the City of North Yakima, in said state, described in the complaint as lots 9 to 14, inclusive, in block 1, and lots 9 to 16, inclusive, in block 2, Heerman's Addition to North Yakima.

The complaint alleged title in the plaintiff, and purported to give a chain of title from the government to the date of commencing the action. (Printed Record, pp. 1 to 5.) The defendants filed an amended answer, in which they admitted their possession, but denied that the title, and denied that the right of possession, were in the plaintiff. By way of affirmative defense, and in the nature of a cross complaint, permitted under the Washing-

ton civil code, the defendants set up the title under which they claimed the right of possession.

It was alleged in this amended answer that blocks 1 and 2 of Heerman's Addition, described in the complaint, was the same land as the tracts described on the tax lists and tax records of Yakima County, as blocks 352 and 372 of Capitol Addition to North Yakima. For several years prior to the second day of May, 1903, said blocks described on the tax lists as blocks 352 and 372 of Capitol Addition, were subject to taxation under the laws of the State of Washington, and were taxed for state, county and municipal purposes. On the second day of January, 1902, Yakima County, in pursuance of the laws of the state, began an action in the Superior Court of the State of Washington for the purpose of collecting unpaid delinquent taxes. Said action was entitled "*Yakima County, State of Washington, plaintiff, vs. Edward Whitson, et al., defendants.*" By reference to the exhibit made a part of the record (Printed transcript, p. 51), it will be seen that the Ontario Land Company was one of the defendants, among a great many others named. Service of summons and notice as by law made and provided, in the said tax foreclosure suit, is alleged, then follow allegations showing consummation of foreclosure proceedings by judgment sale by the county treasurer, and the purchase by the defendant in error, Jay E. Yordy, and the issuance of a deed to him by the treasurer, E. G. Peck, all in accordance with the statutes relating to the foreclosure of liens for delinquent taxes. The treasurer's deed (Ex. "A," p. 10, printed transcript,) shows the conveyance on May 2nd, 1903, to the defendant in the State

court and the defendant in error in this court, of all of blocks 352 and 372 of Capitol Addition to North Yakima. It was further alleged, by way of affirmative answer in support of the tax title issued to Yordy, that for many years prior to the proceeding to foreclose the delinquent taxes against this property, the plaintiff in error was notified by the proper officers of Yakima County that the property in controversy had been assessed in the form of description appearing upon the tax rolls, and in no other form; that the plaintiff refused to pay the taxes, notwithstanding its knowledge that the property had been so assessed, and permitted the taxes to become delinquent, and the property to go to sale under the foreclosure proceeding.

The plaintiff in the court below, and plaintiff in error in this court, by way of reply, put in issue the allegation in defendant's affirmative answer, that the words of description in the petition, to-wit: "Blocks 1 and 2, of Heerman's Addition to North Yakima," and the words of description in the Yordy deed, to-wit: "Blocks 352 and 372 of the Capitol Addition to North Yakima," were different forms of description for the property in controversy. The plaintiff, in its reply, alleged that the descriptive words appearing upon the tax lists and followed in the foreclosure proceeding and the tax deed to Yordy, did not describe any property with sufficient definiteness for identification, an on that ground the tax levied by the authorities against the property in controversy, possession of which is claimed by the plaintiff in error, was void, the foreclosure proceeding based thereon and follow-

ing the description of the property identical with the tax lists, was void, and the tax deed was void, all for indefiniteness and uncertainty of description. The reply then goes on by way of affirmative statement, and alleges, in substance, that in May, 1889, Chester A. Congdon and wife, being the owners of two contiguous eighty-acre tracts described as the west half of the southeast quarter and the east half of the southwest quarter of Section 24, Township 13 north, Range 18 east, Willamette Meridian, excepting ten acres known as "Charles M. Holton's ten acres," dedicated and caused to be recorded a plat of all of said tract owned by them, designated "Capitol Addition to North Yakima, Washington." This plat was filed May 16th, 1889. (Ex. 5, op. p. 48, printed record.) On the plat of the addition there appears a space marked "reserved." This space, if platted according to the uniform size of the blocks of the addition, comprises an area equivalent to four blocks. The allegation in the answer of the defendants that this space marked "reserved" on the plat of the addition, was subdivided by the assessor and by him carried into the tax lists and tax records of the county as blocks 352, 353, 372 and 373, is not denied. If counsel correctly understands the pleader, he admits that the assessor in fact listed and described this reserved area as blocks numbered according to the uniform numbering of the addition, but denies the right of the assessor to so describe in the tax lists and tax records, for the purpose of taxation, the area marked "reserved," because that area was not, in fact, subdivided into lots and blocks, and by reason of said area not being so sub-

divided, the form of description adopted by the assessor, and for years carried in the tax records of the county, was so insufficient and uncertain as not to constitute any description at all, and on the ground the plaintiff as owner of said reserved area, was not chargeable with any taxes thereon, notwithstanding that it knew the form and manner of description adopted by the taxing authorities, and that the taxes chargeable to said property were carried upon the books and records under that form of description. It was further alleged that the summons in the tax foreclosure proceeding, which described the property in the manner in which it was carried on the tax records, to-wit: That portion of this reserved area shown on the plat of Capitol Addition which, by carrying out the uniform system of platting of the Addition, would bear block numbers 352 and 372, was insufficient to identify the property to which it was intended to relate. The plaintiff in its reply, charged, in substance, that the method of description adopted by the assessor and contained in the summons and notice of the foreclosure proceedings, was insufficient and void, because the said words "Capitol Add. N. Yakima, all of B. 352," had no application to, nor were they or any of them descriptive of, nor did they or any of them identify, the land referred to in plaintiff's complaint, or any part thereof. Then follows the same allegation respecting the description carried in the tax rolls as "Capitol Addition, Block 372." Then follows the allegation that said descriptions do not identify the land referred to in the complaint, or any land. The reply winds up by asking the Court to decree the tax certificates of delinquency,

that is to say, the charge of delinquent taxes standing upon the tax records of the county against the property in litigation in this case, the judgment and decree of foreclosure and the tax deed to Yordy thereunder, by virtue of which the defendant in error claims title, null and void. (Printed record, p. 20.) This reply is in the nature of an action to quiet title to the lands described in the Yordy tax deed.

Under the civil code of Washington, all allegations in the reply inconsistent with the answer of the defendant, stand traversed.

On these issues the parties went to trial in the Superior Court. The plaintiff showed a chain of title running from the government, by patent, under the public land laws, to Charles M. Holton, from Charles M. Holton by deed to Chester A. Congdon, excepting from said conveyance ten acres, which is indefinitely described, but such words of description are used that by a surveyor going upon the ground the lines of the excepted ten acres may be definitely located. Congdon and wife filed, and caused to be recorded, the plat designated as "Capitol Addition to North Yakima, Washington," which has heretofore been referred to, and a copy of which is made a part of the record, as Exhibit 5, opposite page 48. A few days after filing the plat of the Capitol Addition, to-wit: May 24, 1889, Congdon and wife quitclaimed the whole tract embraced in the plat, to the plaintiff in error, describing the same in the quitclaim deed as the west half of the southeast quarter and the east half of the southwest quarter, of Section 24, etc., excepting the

Charles M. Holton ten acres. (Ex. 4, p. 46, printed record.) The plat, having been filed and become a part of the county records prior to this quitclaim, must be examined to determine what property passed by virtue of the quitclaim to plaintiff in error. All streets and alleys shown on the plat had, prior to the quitclaim, become public property. This deed passed title to all the lots and blocks embraced in the exterior boundaries of the plat, including the area marked "reserved," but to connect the words of the conveyance with the property conveyed, recourse must be had to the plat of the addition.

The county assessor, in 1892, the first year there appears to have been charged any delinquent taxes involved in this suit, described the area marked on the plat "reserved," as Blocks 352, 353, 372 and 373. There was assessed against said block 352 for the year 1892-3, taxes amounting to $45.37, and against block 372 for the year 1892-3, taxes amounting to $45.37. These taxes, together with interest, and the taxes and interest thereon for the intervening years, up to the time of the entry of the judgment of foreclosure in 1902, it was claimed in said foreclosure proceeding constituted a lien upon the land described in the Yordy deed. (Ex. 7, p. 49, printed record.)

Section 45 of the Revenue Law of the State of Washington of 1891, provides for the assessment of real estate in the following language:

"The assessor shall make out in the real property assessment book, *in numerical order*, complete lists of all lands or lots subject to taxation, showing the names

of owners, if to him known, and if unknown, so stated, opposite each tract or lot, in pencil memorandum, the number of acres, and the lots or parts of lots, or blocks, included in each description of property. The assessment books and blanks shall be in readiness for delivery to the assessor on the first Monday of March of each year: *Provided*, That the numerical assessment shall not apply to the year 1891."

Exhibit 6 shows that in 1904, after Yordy had received the tax deed in question from the county treasurer, and had gone into possession of the property involved in the suit, the plaintiff filed another plat called "Heerman's Addition," in which this area marked "reserved" on the plat of the Capitol Addition, was subdivided into four blocks, blocks 1 and 2 of the said Heerman's Addition being identical with Blocks 352 and 372, if the consecutive and uniform numbering followed in the plat of the Capitol Addition had been followed.

From an examination of the record of the trial, it appears that the matter in controversy was chiefly whether the description on the tax records of the county and in the tax deed to Yordy, described with sufficient definiteness for purposes of identification, the land in controversy, which the plaintiff described as blocks 1 and 2 of Heerman's Addition.

It appears to have been contended on the one side that the words "Capitol Addition to North Yakima, all of Block 352," and "Capitol Addition to North Yakima, all of Block 372," conveyed no information to anyone interested in the subject, because of the fact that on the plat of said Capitol Addition there were no blocks ap-

pearing thus numbered, and that only by some process of reasoning or calculation upon an examination of the plat, could the land intended to be described be found.

It was contended upon the other side that there were on the plat of said Addition no other blocks numbered with the numbers carried out in the tax lists and records; that it was apparent from such an examination that the assessor, in his effort to follow the numerical order required by the statute relating to listing land for taxation, had subdivided the area marked "reserved" into blocks, and had applied numbers consistent with the uniform numbering of the blocks in the Addition. A conversation between the managing agent of the plaintiff and County Treasurer Peck was put in evidence, as follows:

"Q. What was the substance of the conversation?

"A. The substance was that the reason the Land Company didn't pay these taxes for the years 1892, '93, '94 and '95,, or whatever the years were—those embodied in the original certificate of delinquency—the time these taxes were assessed he claimed the property was not assessable because it was city property.

"Q. He gave you the reasons why the company wouldn't pay the taxes and that was the reason?

"A. Yes, sir.

"Q. In that conversation did he say that he was informed that the taxes were charged against this property. * * * Did he make any statement that he knew about that?

"A. I do not know that he made any absolute statement, but in the talk he gave me to understand that he knew the taxes were against this property."

Printed record, pp. 35-6.

There was introduced in evidence another conversation between former County Treasurer Dudley and Albert S. Congdon, the plaintiff's agent at North Yakima, who managed its affairs, including the payment of taxes. (Printed record, bottom of p. 34.)

"Q. Mr. Dudley, what years were you County Treasurer of Yakima County?

"A. From 1899 to 1903.

"Q. During the time that you were County Treasurer did you have any talk with Mr. Albert S. Congdon, the representative of the Ontario Land Company, as to taxes on blocks 352 to 372?

"A. Well, it was on these four blocks, these four that were in that section there.

"Q. Did you have any talk with him as a representative of that company? * * * As to these taxes being delinquent?

"A. Oh, yes.

"Q. Was that talk before the property was sold under this foreclosure proceeding?

"A. Yes, sir. I couldn't say as to the length of time before.

"Q. What was the talk as to that property, the substance of it?

"A. The substance was that they owned that property, and he would perhaps want to take care of that as their property."

Printed record, p. 37.

By reference to the briefs in the Supreme Court of the state, and the opinion of that court, it will be seen that it was considered that this testimony tended to show that the description contained on the county tax lists and in the notice of the tax foreclosure proceeding, and

in the Yordy deed, conveyed both to the public and to the plaintiff, information sufficiently definite and accurate to identify the land intended to be taxed.

To briefly resume, the plaintiff in the State Court claimed the right to recover from the defendant, possession of a tract of land occupied by the defendant, which the plaintiff described by reference to the recorded plat known as Heerman's Addition.

The defendant denied plaintiff's title, and by a pleading in the nature of a cross complaint, set up an independent title based upon a tax deed, the description in which identified the land by reference to the recorded plat known as Capitol Addition.

The plaintiff by way of reply, plead that the tax deed was void , on account of insufficiency of description, and that the Court had no jurisdiction in the tax foreclosure proceeding on which the tax deed was based, on account of the summons and notice in that foreclosure proceeding being insufficient to identify the land.

The point litigated in the State Court was whether, as a fact, the words of the description in the tax lists, followed in the notice of the foreclosure, and carried over into the deed, were sufficient to identify the property in controversy with reasonable certainty.

The State Supreme Court, on appeal, having power under the laws of Washington to examine the whole case *de novo,* found that the descriptive language used by the taxing officers of Yakima County in the notice of tax foreclosure, tax judgment, and carried over into the tax

deed, was sufficient to identify, with reasonable certainty, the property to which all of said matters related, and that the Superior Court, as a consequence, had jurisdiction in the tax foreclosure proceeding. (Opinion of the Supreme Court, pp. 58-61, printed record.)

In the record of the case in the trial court of the state (the Superior Court), no mention is made in any pleading, objection to testimony, finding of fact or otherwise, of any federal law or the federal constitution, or to any right, privilege or immunity claimed under the Constitution or laws of the United States. No question is raised as to the validity of any statute of the State of Washington. No proceeding under any statute of the State of Washington in the foreclosure proceeding or elsewhere, is attacked as invalid, because in conflict with any law or the Constitution of the United States. The Superior Court found as a fact that the description embraced in the tax deed was not sufficient to identify the land in controversy, (Seventh finding of fact, p. 22, printed record), and upon this finding of fact, found as a conclusion of law "That the proceedings of the assessor and taxing officers of said county, set forth upon the said taxing records and lists of said county, and the proceedings in the said case of *Yakima County versus Edward Whitson, et al.*, were inadequate to charge the said lands or any thereof with any lien or charge whatsoever, and were inoperative upon the same, or upon any thereof."

Conclusions of Law, paragraph 4, p. 23.

In accordance with this finding of fact and the legal conclusion drawn therefrom, the Superior Court entered

judgment awarding possession to the plaintiff. From this judgment the defendant appealed to the Supreme Court of the State, took up the entire record, and in that Court had a trial *de novo*.

An examination of the briefs in the Supreme Court of the state shows that the defendants in the trial court, who became the appellants in the Supreme Court, and are now the defendants in error in this court, insisted upon three distinct grounds for the reversal of the decision of the trial court, and for judgment in favor of the defendants.

First, counsel for appellants in the State Supreme Court urged that the tax rolls, notice of foreclosure, judgment of foreclosure, and the deed based thereon, described the property with sufficient definiteness and accuracy for identification, and that the property described in said tax proceedings and tax deed was the identical property described in the plaintiff's complaint, and the property in controversy in this litigation.

(Brief for appellant, State Supreme Court, pp. 45, 46.)

Second, counsel for defendants and appellants claimed that the record of the tax foreclosure proceeding and the judgment rendered therein, imported absolute verity, and that the recitals in said judgment were not in this proceeding subject to collateral attack (Appellant's brief in Supreme Court, pp. 47-55).

Third, it was contended that the regularity of the tax foreclosure proceedings was not subject to attack with-

out tendering the delinquent taxes assessed against the property, as required by the laws of Washington (Appellant's brief, pp. 56-59), Ballinger's Code, Section 5678, which reads as follows:

"Hereafter no action or proceeding shall be commenced or instituted in any court of this state to enjoin the sale of any property for taxes, or to enjoin the collection of any taxes, or for the recovery of any property sold for taxes, unless the person or corporation desiring to commence or institute such action or proceeding shall first pay, or cause to be paid, or shall tender to the officer entitled under the law to receive the same, all taxes, penalties, interest, and costs justly due and unpaid from such person or corporation on the property sought to be sold or recovered."

Before filing its reply in the trial court, attacking the validity of the tax foreclosure and deed, the plaintiff was fully informed by the answer that the taxes assessed, the lien for which was foreclosed, covered this identical property. The regularity of the foreclosure proceeding was clearly precluded by the section of the statute above quoted. The Supreme Court of the state so construed the statute, and did not review any question except that relating to the jurisdiction of the Superior Court in the foreclosure proceeding. (Conclusion of the opinion, p. 61, record.)

The brief of the plaintiff in the trial court and respondent in the Supreme Court of the state takes up the points made by the appellant in the foregoing order, which is the order stated in appellant's brief. The first point discussed, to-wit: the sufficiency of the description in the tax proceedings, is argued to the Supreme

Court wholly as a proposition of local law, the sole effort of counsel being to convince the Supreme Court that the description was insufficient to identify the property, and that, consequently, the whole tax proceeding was void, from the list in the tax rolls to the final recording of the tax deed. No law of the United States, or provision of the Constitution of the United States, is referred to or relied upon in the argument. Nowhere in the discussion of this point is any federal question alluded to.

Upon the second point made by the defendants and appellants in their argument and brief in the Supreme Court, that the tax judgment and deed are conclusive upon all the world, and that the court has no power to examine into the question, even to determining the jurisdiction of the Superior Court over the parties and the subject matter, counsel cite Section 1767, 1 Ballinger's Code and Statutes of Washington, which reads:

"Deeds executed by the county treasurer, as aforesaid, shall be *prima facie* evidence in all controversies and suits in relation to the right of the purchaser, his heirs and assigns, to the real estate thereby conveyed of the following facts:

First: That the real estate conveyed was subject to taxation at the time the same was assessed, and had been listed and assessed in the time and manner required by law;

Second: That the taxes or assessments were not paid at any time before the issuance of deed;

Third: That the real estate conveyed had not been redeemed from the sale at the date of the deed;

Fourth: That the real estate was sold for taxes, assessments, penalties and costs, as stated in the deed;

Fifth: That the grantee in the deed was the purchaser, or assignee of the purchaser;

Sixth: That the sale was conducted in the manner required by law.

And any judgment for the deed to real estate sold for delinquent taxes rendered after the passage of this act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessments have been paid, or the real estate was not liable to the tax or assessment."

Numerous decisions of the Washington Supreme Court are cited in connection with the construction of that statute. To meet the construction of Section 1767 above quoted, contended for by the defendants and appellants, counsel for the plaintiff and respondent made the following statement:

"Whatever jurisdiction the Court had in *Yakima*

County vs. Whitson et al., over *some* lands, its judgment was not operative upon the land in the complaint at bar because said land is not described in the published summons nor in the judgment nor elsewhere in the judgment roll in said *Yakima County vs. Whitson et al.*, and to give Section 1767 of 1 Ballinger's Code the force contended for by counsel, and thereby divest plaintiff of the title to said land, would simply be confiscation, and in contravention of the Fourteenth Amendment to the Constitution of the United States, inhibiting the taking of property without due process of law."

Respondent's brief, State Supreme Court, pp. 34-5.

It may be argued that counsel, by this language, raised a federal question, to-wit: that Section 1767, construed as contended for by the appellants, as an absolute bar to the examination of the court into the question of jurisdiction over the parties and subject matter in the tax foreclosure proceeding, would be in contravention to the Fourteenth Amendment to the Constitution of the United States, prohibiting the conveying of property without due process of law; but the Supreme Court of the state did not construe the statute referred to as prohibiting an examination into the subject of jurisdiction. By reference to the opinion it will be seen that the Supreme Court disregarded the appellant's argument on this point and went into the question of jurisdiction and determined that the Superior Court had jurisdiction in the tax foreclosure proceeding, and that the description was sufficient, under the statutes of Washington, to give said jurisdiction. This is the only allusion to any federal question throughout the entire record in the State Court, including the briefs, down to the point of the

filing of a petition for re-argument, in the Supreme Court of the State.

The Supreme Court, having found that the Superior Court had jurisdiction of the tax foreclosure proceeding, refused to review any errors or irregularities in that proceeding in this collateral proceeding, applying Section 5678 above quoted.

Attention is called to the petition of the plaintiff and appellee in the State Supreme Court, for a re-argument, beginning at page 66 of the printed record, and particularly to the fifth ground stated in that petition:

"That your petitioner claims the right to such re-argument and rehearing upon the ground that while, as a matter of law and in effect, the judgment of this Court deprived your petitioner of its property without 'due process, of law,' and that such is the necessary effect of the judgment of this court in this case, yet the legal aspect of the question of 'due process of law' has not been discussed by the Court in its opinion, and was evidently overlooked by the Court, although the question was raised by the respondent in its brief (see page 35 of respondent's brief), wherein it was specially claimed that to give the force and effect to the tax judgment and tax deed claimed by appellant's counsel, is to divest the respondent of the title to said land, in contravention of the Fourteenth Amendment to the Constitution of the United States, inhibiting the taking of property without 'due process of law.'

"That the reason why the question of 'due process of law' has not been fully argued, is because the tax judgment and title in question was by the trial court held absolutely null and void as to the lands of respondent, and that the judgment of this Court to the contrary could

not have been reasonably anticipated by counsel learned in the law.

"That until the adverse decision of this Court, there was no opportunity presented to respondent to rely upon or claim the protection of the Fourteenth Amendment, because the trial court held in conformity thereto."

Eliminating the reference to page 35 of the brief above quoted, relating to the construction of said statute hereinbefore quoted, on which point the Supreme Court agreed with the contention of counsel and construed the statute as not being conclusive upon the subject of jurisdiction, it is admitted that no federal question was presented to the State courts. Counsel's excuse for failure to so present a federal question is that he did not anticipate an adverse decision on the other points involved. He apparently did anticipate the possibility of an adverse decision of the Supreme Court upon the conclusive effect of the statute referred to.

We do not criticize the propriety of counsel's argument in the petition for a rehearing, addressed to the discretion of the Supreme Court. In the stress of the case he made an appeal to that Court to grant him a rehearing so that he might, on that rehearing, present such a case that, in the event of the affirmance by that Court of its original decision, this Court would have jurisdiction to entertain a petition in error.

In the brief in support of its petition for re-argument, counsel for the plaintiff throughout the proceedings in the State Court, with whom were united on the brief other distinguished counsel, makes this statement:

"The judgment of this court is not 'due process of law,' and the question whether it is or not is a federal one.

"Under this head, we ask the Court to allow a rehearing upon the federal question of 'due process of law.' This question was not presented on the argument of the case, and has arisen solely because of the adverse decision of the Court in this case, which was a surprise to respondent."

(Page 51 of the certified copy of the manuscript brief attached to the original motion in this Court to dismiss.)

On pages 77 and 78 of the printed record will be found a document entitled "Certificate of Federal Question," signed by Hiram E. Hadley, Chief Justice of the Supreme Court of Washington, and filed after the denial of the petition for re-argument, as appears from the judgment of the Supreme Court, entered on January 8th, 1907. (Printed transcript, p. 62.) The Chief Justice certifies that in said cause, and on the hearing before the Supreme Court, it was claimed, contended and alleged by the said Ontario Land Company that to give force and effect to the tax judgment and tax deed would amount to depriving the said company of its property without due process of law. It is further stated in said certificate that the reasons assigned by the Ontario Land Company for its contentions, were, that to constitute proper notice under said Fourteenth Amendment in a tax proceeding *in rem*, the description of the property sought to be taken and sold for the tax, must be so full as to be intelligible to persons of ordinary intelligence, and that

the description of the lands in question in the tax summons notice, judgment and tax deed involved, was wholly insufficient for the purpose, etc.; that the decision of the Court was in favor of the validity of the tax judgment, and that the taking of the property, under the circumstances of this case, did not amount to a taking without due process of law; and, further, for the reason that no notice was given to the said Ontario Land Company of the pendency of this action, and that the tax judgment was rendered without a hearing or an opportunity to be heard. And then follows statements of various irregularities called to the attention of the Court in the proceeding to foreclose the tax judgment.

It is quite evident, from a reading of the original briefs before the Supreme Court, that the Honorable Chief Justice bases this certificate of a federal question wholly upon the petition for re-argument and the brief filed in support of it. It is to be assumed that the entire court considered the petition for a re-argument, so ingeniously addressed to its discretion, and so ably argued by distinguished counsel.

We have brought before this court, by way of supplemental record, the brief in support of the petition for re-argument, because the transcript of the record in the trial court, including the complete statement of facts, showing what took place in that court, the briefs on the original presentation of the case to the Supreme Court, and the opinion of the Supreme Court, all go to show conclusively that no federal question involved in the decision of the Supreme Court was presented before the

petition for re-argument. In view of these facts, we solicit very careful attention to the guarded language of the Chief Justice in this certificate, which is consistent only with the view that he was referring in this certificate to the matters brought before the court in support of the petition for re-argument.

Having given quite fully a statement of the case insofar as it bears upon the question of the jurisdiction of this court to consider this writ of error, the defendants in error will content themselves by very briefly stating their points and authorities bearing upon that question.

I.

This court has no jurisdiction because no federal question was raised in the state court prior to the petition for re-argument.

II.

Because no federal question was involved in the issues presented to the courts of the State of Washington.

ONE.

On the first point this court has so conclusively and so frequently settled the law, that we deem no discussion of authorities necessary. The case is identical in all respects with *Pim v. St. Louis*, 165 U. S. 273. In that case it was claimed that a right protected by the Constitution of the United States had been violated by applying to the facts of the case a statute of the State of Missouri carrying with it the construction by the highest court of that state. Quoting from page 274:

"Upon inspecting the record, we find that no federal right was set up or claimed, in any form, until after the final decision of the case by the Supreme Court of Missouri, and then by a petition for rehearing. That petition was overruled by that court without any determination of the alleged federal question, indeed, without any allusion to it. The claim of a federal right came too late, so far as the revisory power of this court is concerned. *Loeber v. Schroeder*, 149 U. S. 580, 585; *Sayward v. Denny*, 158 U. S. 180, 183."

Miller v. Cornwall R. R., 168 U. S. 131, reaffirms the rule in every respect. It is there held, on the authority of *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 70, that the federal question must appear upon the face of the record. It must be raised before the case is decided by the Supreme Court of the state, and if raised upon an application for re-argument, the suggestion comes too late.

Texas & Pacific Ry. Co. v. Southern Pacific Co. 137 U. S. 48.

Chicago & N. W. Ry. Co. v. Chicago, 164 U. S. 454.

Not only must a federal question have been raised in the state court, but such federal question must have been decided adversely to the party claiming the right of review in this Court.

Eustis v. Bolles, 150 U. S. 361.

Pierce v. Somerset Ry., 171 U. S. 641.

The attention of the court has already been called to the only place and the only point where the plaintiff in error in the court below squinted at a federal question, and on that point, involving the conclusive character of

the tax deed, the decision of the Supreme Court was in its favor; consequently its rather indefinite allusion to a federal question cannot now be made a makeweight to sustain the jurisdiction of this court.

It appears affirmatively that no federal question was raised prior to the filing of the petition for re-argument, which the court considered in rendering its opinion. The opinion is a part of the record for that purpose.

Murdock v. Memphis, 20 Wallace, 590.

Gross v. United States Mortgage Co., 108 U. S. 477.

The Constitution of Washington requires "in the determination of causes, all decisions of the court shall be given in writing, and the grounds of the decision shall be stated."

Article IV, section 2; 2 Ballinger's Code p. 2089.

If the certificate signed by the Chief Justice, relating to the presentation of federal questions, be given its broadest construction, and be held to mean that on the argument of the case in the Supreme Court these questions were, in fact, presented, nevertheless, that argument would not confer upon this court jurisdiction, for the reason that it appears from the opinion of the Supreme Court that the case was decided upon issues not involving federal law.

Adams County v. Burlington & Missouri River R. R. Co., 112 U. S. 123.

It is not any part of the duty of the Supreme Court of Washington to make certificates of what occurred on

the argument. Its duty is to decide, in writing, the points presented, with reasons for the decision. The certificate cannot be accepted as anything more than *prima facie* evidence, and if in conflict with the record certified by the court, such certificate should be disregarded.

The language of this certificate should be construed in harmony with the facts shown upon the face of the entire record. There should be applied to it that construction which will make it consistent with the truth. It bears that construction if read as applying only to the petition for re-argument, and the brief in support thereof.

TWO.

It does not appear on the face of the record before this court, that any federal question was involved in the State Court. There was not drawn in question the validity of any statute of the United States, or authority exercised thereunder; there was not drawn in question the validity of any statute of the state on the ground that such statute was repugnant to the Constitution of the United States; and the decision of the state court is in favor of the validity of such statute. The only statute drawn in question was not construed by the Supreme Court in such a way as to make it material to the decision of the case. The construction of the statute relating to the conclusiveness of tax deeds based upon tax foreclosure judgments, apparently adopted by the Supreme Court of the state, was in harmony with the contention of the plaintiff in error. The decision was not adverse

to it, and consequently, on that point it cannot claim the right of review in this court.

The plaintiff did not claim any title, right, privilege or immunity under the Constitution of the United States, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was not against the title, right, privilege or immunity specially set up or claimed under such Constitution, etc. No title, right, privilege or immunity was specially claimed anywhere throughout the progress of the case in the state courts.

The only other ground on which, in the stress of the case, the plaintiff in error can contend that this court has jurisdiction, is that the record draws in question "authority exercised under any state," on the ground that such authority was exercised in a manner repugnant to the Constitution of the United States. This was the position it took on its petition for re-argument in the Supreme Court of the state, and we assume that it will be its position in this court. It has no other grounds. Is that ground tenable?

As has been made to appear by the foregoing statement of the case, the defendants base their claim of title upon the tax deed and the foreclosure proceeding antecedent thereto. The plaintiff attacked the validity of this tax deed, on the ground that the court which decreed the sale had no jurisdiction, because the description in the notice of the pendency of the proceeding was insufficient to describe the land with reasonable certainty. The

question of the sufficiency of the description for the purpose of charging the land with the tax, and for the purpose of conferring upon the court power to sell it, to satisfy the tax, became a judicial question within the cognizance of the Superior Court, as a court of general and original jurisdiction, and within the cognizance of the Supreme Court as the court of appeal, having jurisdiction *de novo*. The state courts heard the question thus presented, both upon the facts and the law, and decided the question in favor of the tax title. The plaintiff in error now seeks to review the correctness of that decision, not because it did not have a fair trial in the state courts, but because it conceives that this court may not be of the same opinion as the Supreme Court of the state upon the questions of law and fact involved in the decision of that court. This court is therefore called upon to sit as a court of error, to declare a judgment of the Supreme Court of Washington, wrong, upon a state of facts duly considered by that court after reviewing the evidence offered without restriction by both parties, and rendered upon the law as applied to that evidence, after the argument of able counsel.

The cases of *McNeal v. Scott*, 154 U. S. 34; *Roller v. Holly*, 176 U. S. 398; and *Bellingham v. Whatcom*, 172 U. S. 318, are referred to by the plaintiff in error in its brief in support of its petition for re-argument in the State Supreme Court, and are apparently relied upon to support its contention that the judgment of the Supreme Court, confirming the tax title, is in conflict with the "due process of law" clause of the Fourteenth Amend-

ment to the Constiitution of the United States. In *Roller v. Holly* it was held that a statute of a state which gave no opportunity in a legal proceeding for an adverse party affected by the litigation to appear and defend, was in conflict with the "due process of law" clause, and the statute of Texas giving a non-resident defendant but five days after notice of the commencement of the suit, to appear and answer, did not give to a defendant residing in Virginia, reasonable opportunity to defend a case brought against him in the State of Texas. The decision of this court is based upon the sound doctrine that the state cannot, by statute, or otherwise, for that matter, deprive a party affected by litigation, of opportunity to bring to the attention of the court facts on which he relies to uphold his claim to the property. A judgment denying to a party the opportunity to present his case, by denying him reasonable time to get into court, amounts to a denial of due process of law, and is void. The case does not appear to have any bearing upon the case at bar. If reasonable time had been allowed by the statute of Texas for Roller to appear in its courts after receiving notice of the pendency of the suit involving his property, and if, for want of appearance, judgment had been entered against him by default, and if, afterwards, he appeared, and in an appropriate proceeding for the purpose, alleged that he had not, in fact, been served with process, and an issue had been made up in the state court involving the question as to whether, in fact, he had been served or had not been served, and the question of jurisdiction over him as a basis for the rendition of the original

judgment had been fully litigated by the courts of Texas upon the facts as to whether there was or was not service, would this court have held that the decision of the Texas courts upon that point, involving the facts, would be subject to review? Such a case would be analogous to the one at bar.

The case of *Bellingham v. Whatcom* was quite analogous to *Roller v. Holly,* and involved the question as to whether or not a statute giving ten days' time for a defendant to answer in a tax foreclosure case, afforded reasonable time to present a defense, and, consequently, reasonable time to have the cause adjudicated according to the usages of the court. This court in that case held that when the question of reasonableness of time given to a defendant to appear, by statute, is called in question, the validity of such a statute is called in question under the "due process of law" clause.

Both of these cases involve the question of the validity of a statute. The case at bar does not involve the validity of any statute of the State of Washington. It involves the single question as to whether or not the statutes of the state relating to taxation and the foreclosure of tax liens, have been complied with. This case involves the judicial question of what under the statute constitutes a sufficient description to charge a piece of real estate with its share of the burdens of government. The court in this case determined judicially that the statute had been compiled with, and that the description on the tax rolls and in the

tax foreclosure judgment and in the tax deed, did fairly describe the land taxed.

In the case of *Scott v. McNeal*, the question in the State Courts of Washington was whether the Probate Court, in the sale of Scott's property under a probate proceeding for the payment of debts, had jurisdiction of the subject matter involved in that proceeding. Scott came into court and offered to show that he was alive, and consequently his estate was not subject to administration and sale as the estate of a deceased person. He attacked the judgment of the Probate Court upon the ground that it had no jurisdiction to sell his property while he was alive, as the property of a deceased person. On that attack in a collateral proceeding the State Court held that the deed of the administrator was conclusive, and upon that ground refused to entertain Scott's complaint, and refused to permit him to show that he was alive—a fact going to the very foundation of the jurisdiction of the Probate Court. But suppose the State Court had entertained Scott's complaint, and heard evidence touching upon the question of whether or not he, the plaintiff, who was then attacking the judgment of the Probate Court, was the same Scott who originally owned the land in litigation, and which was sold by the administrator; suppose upon proper issues tendered there had been a controversy as to whether or not the plaintiff claiming to be the owner of the land, was an impostor, and not the genuine Scott; and suppose the trial had proceeded with conflicting evidence, pro and con, touching the issue of death of the

original owner and the false pretensions of the claimant, and the court after hearing all the evidence, had arrived at the conclusion that the real Scott referred to in the probate proceeding was, in fact, dead, and that the claimant was a pretender, and had, upon that conclusion, found that the Probate Court had jurisdiction to administer the estate, would this court have reviewed, under those circumstances, the judgment of the State Court?

The case at bar resembles more nearly the questions involved in *Grignon's Lessees v. Astor*, 2 Howard 318. That case involved the validity of the judgment of a Probate Court. An attack was made upon the judgment of the Probate Court on the ground, as it was alleged, that the petition in the probate proceedings under which the land was sold, alleged that the goods and chattels of the deceased were not sufficient to answer his just debts, whereas it was sought to show in the collateral proceeding that these debts, under the law, were not a proper charge upon the land, and for that reason the Probate Court had no jurisdiction to order the sale. At the trial in the Supreme Court of the Territory of Wisconsin, numerous questions of evidence arose, and many instructions were asked of the court, but in the great opinion delivered by Mr. Justice Baldwin, he disposes of all these incidental matters with the statement that the whole merits of the controversy depend on the one single question, had the County Court of Brown County jurisdiction of the subject on which they acted? The Justice then goes on to say:

"The power to hear and determine a cause is juris-

diction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner presents such a case in his petition, that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction, conferred by the filing a petition containing all the requisites, and in the manner required by law." 6 Pet. 709. "Any movement by a court is necessarily the exercise of jurisdiction; so, to exercise any judicial power over the subject matter and the parties, the question is whether, on the case before a court, their action is judicial, or extra-judicial, with, or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction, what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it." Page 337.

In the case at bar the State Court proceeded in a judicial way to determine *under the facts* whether, under the laws of the State of Washington, this property had been described with sufficient definiteness to afford a means of identification. That action of the State Court in this case was the exercise of its jurisdiction upon a matter purely of state law, in determining whether or not the title resulting from the tax foreclosure suit was a valid title or void. The State Court having afforded the parties to this suit a full, complete and fair trial upon

every question of law and fact presented, and having come to a conclusion upon these matters of which it had cognizance under the local laws and statutes of Washington, we submit that it is not within the province of this court, under the Federal Judiciary act, to review that decision. It appears to us that the attempt of the plaintiff in error to invoke the jurisdiction of this court to review the judgment of the Supreme Court of Washington, is condemned by the opinion of this court by Mr. Justice Miller, in *Davidson v. New Orleans,* 96 U. S. 97, and particularly at pages 104-5. This great opinion was rendered soon after the adoption of the Fourteenth Amendment. The learned Justice observes:

"There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. * * * whenever by the laws of a State, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

The "due process of law" clause of the Federal Constitution is complied with generally when a party has his day in court, and this is especially true when the matter in controversy is one wholly of state cognizance.

Walston v. Nevin, 128 U. S. 578.

Lent v. Tillson, 140 U. S. 316, 327.

Security Trust & Safety Vault Co. v. Lexington, 203 U. S. 323.

Mere irregularities in the rendition of a judgment of foreclosure of the lien of taxes do not raise a federal question.

Ballard v. Hunter, 204 U. S. 241.

The State Court refused to review irregularities charged in the tax foreclosure suit, not going to the jurisdiction of the court in that suit, for the reason that the taxes charged against the property had not been tendered. This construction of the statute by the State Court does not involve any federal question. The petition in error in this court charges that such irregularities in the State Court constitute denial of due process of law. The ground on which the Supreme Court refuses to review mere irregularities in a collateral proceeding, is certainly sound, in view of the state statute, and it is not charged in this case that the state statute on which the Supreme Court bases its refusal to review such irregularities, is in conflict with the Constitution of the United States.

Respectfully submitted,

BENJAMIN S. GROSSCUP,

For Defendants in Error.

Office Supreme Court, U. S.
FILED.
APR 13 1908
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

ONTARIO LAND COMPANY,
Plaintiff in Error,

vs.

JAY E. YORDY and MINNIE E. YORDY, his wife,
Defendants in Error.

No. 59

IN ERROR TO SUPREME COURT, STATE OF WASHINGTON.

BRIEF FOR DEFENDANTS IN ERROR

on the Merits.

BENJAMIN S. GROSSCUP,
For Defendants in Error.

The Bell Press, Printers.

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OCTOBER TERM, 1907

ONTARIO LAND COMPANY,
Plaintiff in Error,

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Defendants in Error.

No. 277

BRIEF FOR DEFENDANTS IN ERROR

on the Merits.

The case is fully stated in our brief in support of the motion to dismiss the writ of error on the ground that this Court has no jurisdiction. The discussion of that question necessarily involved some discussion of the merits of the issue before the Supreme Court of Washington. If this Court reaches the conclusion that it has jurisdiction, we ask consideration of our brief upon the motion so far as it relates to the merits of the original controversy. The Court will thus be relieved of the reading of useless repetition.

It is the policy of the State of Washington to sustain tax titles. Errors of a technical character in assessments and foreclosure proceedings are disregarded. So long as substantial justice is done, real estate is not permitted to escape the burden of taxation, and the title to land is not permitted to remain for years under the cloud of a title forfeited by the owner's failure to promptly bear his share of the burden of government.

Spokane Falls & N. Ry. Co. v. Abitz, 38 Wash. 8;
Carson v. Titlow, 28 Wash. 196;
Rowland v. Eskeland, 40 Wash. 253;
Shipley v. Gaffner, 7 Wash. Dec. 400; 93 Pacific 211.

The old rule that a tax title must fail unless officers have crossed every "t" and dotted every "i" is no longer followed. The "Capitol Addition" was platted by Chester A. Congdon, May 16, 1889. (Page 48, Printed Record.) The plaintiff afterwards received its title to the blocks and lots composing this addition, by deed describing the land as two half quarter sections, according to the government survey.

The tax assessor was required by law to enter the property on his rolls as lots and blocks, in numerical order. This was easy, until it came to the tract marked on the plat "reserved." Nothing in the law prevented him from subdividing this area into tracts corresponding in size with the adjoining blocks. Suppose he had described the land now involved as "North half of *reserved* tract, Capitol Addition," could any question be raised about

A tax law is within the fundamental requirement of "due process" if the owner at some stage is given opportunity to be heard, and a requirement that he shall give security to pay or deposit the just amount of tax as a condition to the prosecution of a suit is not a denial of a federal right.

McMillen v. *Anderson*, 95 U. S., 37.

The courts of Washington exercise broad revisory power over the acts of taxing officers.

Templeton v. *Pierce County*, 65 Pac. Rep., 553.

This court will not look beyond the federal question unless such federal question has been decided erroneously by the state court.

McLaughlin v. *Fowler*, 154 U. S., 663.

The state court having correctly decided the legal question and examined into the question of fact as to whether the property involved was taxed, this court will not review that finding.

Dower v. *Richards*, 151 U. S., 658.

King v. *Portland*, 184 U. S., 61-70.

And many cases to the same effect.

the certainty of the description? Yet it would have been necessary to look at the plat to locate the land. The as-

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This court has repeatedly said that in matters of taxation the federal courts will follow the rulings of the state court on all questions involving the tax laws.

Bardon v. Land & River Imp. Co., 157 U. S., 327, 330.

Ballard v. Hunter, 204 U. S., 241, 262.

In *Lewis v. Monson*, 151 U. S. 545, 549, Mr. Justice Brewer says:

"No question is more clearly a matter of local law than one arising under the tax laws. Tax proceedings are carried on by the state for the purpose of collecting its revenue, and the various steps which shall be taken in such proceedings, the force and effect to be given to any act of the taxing officers, the results to follow the non-payment of taxes, and the form and efficacy of the tax deed, are all subjects which the state has power to precribe, and peculiarly and vitally affecting its well-being. The determination of any questions affecting them is a matter primarily belonging to the courts of the state, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal Constitution has been invaded."

Supreme Court, U. S.
FILED
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM A. D. 1907

No. 59.

ONTARIO LAND COMPANY,
PLAINTIFF IN ERROR
AGAINST
J. R. YORDY AND
MINNIE R. YORDY,
DEFENDANTS IN ERROR

IN ERROR TO SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

ARCADIUS L. AGATIN,
For Plaintiff in Error.

WILLIAM W. BILLSON,
Of counsel.

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SUPREME COURT
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OCTOBER TERM A. D. 1907

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BRIEF FOR PLAINTIFF IN ERROR
ON MOTION TO DISMISS.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS:

As it is incumbent upon us to support the jurisdiction against any doubts that might possibly

suggest themselves to the Court, whether raised by counsel or not, we had, before notice of the motion to dismiss, prepared a brief on jurisdictional questions to be submitted as a prefix to our brief upon the merits. The same precautionary considerations that suggested the preparation of such a brief seem now to forbid its curtailment, although the learned counsel for defendant in error has seen fit to confine his argument to unexepectedly narrow limits. We, therefore, present first, our own brief in support of the jurisdiction, as originally prepared, and add thereto a subdivision *"Fourth"* by way of reply to the propositions especially relied upon by counsel for defendants in error.

STATEMENT OF THE CASE.

The writ is for the review of a final judgment of the Supreme Court of the State of Washington, upon the ground that an authority exercised under the state, the validity of which was drawn in question in the State Court, for repugnancy to the Constitution of the United States, was by the judgment erroneously held valid.

The action, which as permitted by the Wash-

ington practice, is one of ejectment and to quiet title, was brought by plaintiff in error, to whom the lands in controversy were shown by uncontroverted testimony to have been duly conveyed by the immediate grantee of the government's patentee. (Fols. 54-57 and 75-88 of Record). Defendants' only claim of title was under a tax judgment and deed, concerning which it was contended by plaintiff, that they do not describe, or have reference to, the lots in controversy or to any tract of which they are a part. As disclosed by the testimony, the facts bearing upon this question of description, are as follows. Plaintiff's grantor having purchased from the government's patentee, the tract of which these lots are a part, caused it to be duly platted, May 27th, 1889, as "Capitol Addition to North Yakima, Washington," (Fols. 56 and 88-90 and Plaintiff's Exhibit 5,) and afterwards, May 24th, 1890, duly conveyed the platted tract to the plaintiff. (Fols. 56 and 86, 87 of Record.) Near the center of this plat, (Plaintiff's Exhibit 5, Fols. 88-90 of the Record,) there was a large tract marked *"Reserved"* and not subdivide into either blocks or lots. Fourteen years later, September 27th, 1904, plaintiff duly platted and subdivided the said tract marked "Reserved," as "Heerman's Addition to North Yakima." (Fols. 56, 88-90 and plaintiff's Exhibit 6.)

The lands in controversy are a part of the said tract so originally marked "Reserved," and constitute lots 9, 10, 11, 12, 13 and 14, of Block 1, and lots 9, 10, 11, 12, 13, 14, 15 and 16, of Block 2 of said "Heerman's Addition to North Yakima," and are so described in the complaint. (Fols. 2 and 5.)

To prove title in themselves, defendants introduced in evidence a judgment of Sept. 2nd, 1902, of the Superior Court of Yakima County foreclosing a tax lien of the County for the taxes for 1892-3, upon blocks 352 and 372 of the Capitol Addition to North Yakima, and a tax deed of May 2nd, 1903, of blocks so numbered to Defendant Jay Yordy, executed in pursuance of a sale had under said tax judgment. (Defendant's Exhibits "A" and "B," Fols. 100, 103, and 60-62.) The plat of "Capitol Addition to North Yakima," (Plaintiff's Exhibit 5 Fols. 88-90) shows that *there was never any such block as block* 352 *or as block* 372. *Neither was there any evidence or pretext that any part of either the platted or reserved tract had ever been known by such numbers.* The only reason assigned for supposing the descriptions in the tax judgment and deed to describe or cover the property in controversy, is that *if* the tract marked "Reserved" upon the plat of "Capitol Addition to North Yakima" had been originally subdivided into blocks, and *if* the scheme of consecutive numbering dis-

closed by the plat had been extended over that tract, these lots in controversy *would have been* located in blocks that would have been numbered 352 and 372 respectively.

Subject to objections for immateriality, some evidence was also introduced by defendants, tending to show that prior to the tax judgment, it was understood by the manager of the plaintiff company, that the numbers 352 and 372 had in fact been used in the tax proceedings to designate portions of the tract marked *"Reserved."* (Fols. 64-69.) *There was no evidence of any record by any of the tax officers, indicating to what property it was, that the numbers* 352 *and* 372 *were by them intended to be applied.* It was contended by plaintiff that since Washington real estate taxes are assessed and enforced against the property only, and do not import a personal obligation, it is an indispensable condition of their validity that they plainly describe the land taxed; and that to hold that the tax proceedings in question had divested title to lands which they had not described, would be to take property without due process of law within the meaning of the Fourteenth Amendment of the Federal Constitution; and that this result would not be changed, though plaintiff had accidentally received information what property

it was to which the tax officers intended that their impossible description should apply.

The trial court found as matter of fact, that the plaintiff had acquired the patent title to the lands in controversy, and that the tax proceedings relied upon by defendants contained no descriptions applicable to them, and as conclusion of law that plaintiff was entitled to relief prayed for; and judgment was so entered restoring plaintiff to possession and quieting its title as against defendants. (Fols. 39-46.) On appeal to the Supreme Court of the State, the judgment was reversed, *and a decree ordered quieting defendant's title* as against the adverse claims of the plaintiff. (Fol. 109.) The lands were held to have been adequately described in the tax proceedings; (Fols. 105-108) and upon the ground that the plaintiff had not, prior to the commencement of its action, made the tender of the delinquent taxes, which by section 5678 of Ballinger's Codes and Statutes, of Washington, (hereinafter quoted) is made a condition precedent to the setting aside of a tax sale, (Fol. 109,) the court declined to consider whether the tax judgment was jurisdictionally defective because of the failure to file in the clerk's office the certificate of delinquency and complaint or application for judgment. (See opinion as reported in 87 Pac. Rep. 257.) Upon this subject of tender, plaintiff's

contention had been that the Statute could have no application, where, as here, the lands in controversy had not been described or included in any tax proceedings, and where consequently no taxes could be said to have been assessed, either regularly or irregularly, upon them, nor any tax judgment or deed to have been rendered or issued against them; that there was, in such case, merely an unfounded *claim* of assessment.

But in a way now to be noticed, the judgment of the Supreme Court of the State gives rise to a second question upon which plaintiff claims to be entitled to the judgment of this court. The plaintiff in its complaint after setting forth it own title had merely alleged that defendants were in the unlawful possession under a wrongful claim of some estate or interest in the land adversely to plaintiff. (Fol. 8.) Defendants had answered setting up their alleged tax title, (Fols. 12-16) and *praying dismissal, without affirmative relief.* (Fol. 17.) Plaintiff had replied denying that the lands in controversy were described in, or affected by, the tax proceedings, judgment, or deed, relied upon in the answer, and setting up certain jurisdictional defects in said judgment. (Fols 32, 33, 70-74.) Thus, the Supreme Court of the State, while as above noticed, holding the merits of the tax title not examinable, because tender had not been made of the delinquent

taxes, at the same time assumed not only to adjudicate the merits of the case, but to transcend the relief prayed for by defendants, by ordering a decree quieting defendants' title (Fol. 109); thereby taking plaintiff's property without that opportunity to be heard upon the merits of the controversy, which is of the essence of due process.

Upon the special grounds assigned in the third heading of the brief on jurisdictional questions, it is submitted that this exercise of State authority also, was sufficiently drawn in question as repugnant to the federal constitution, to be reviewable here.

MATERIAL PROVISIONS OF THE WASHINGTON STATUTES.

The following are the material provisions of the Washington tax laws, all the citations being from the 3rd or Supplemental Volume of Ballinger's Codes, except the first which is from Volume 1 of the original work, and the last two which are from Volume 2.

"Sec. 1749. Any day after the taxes

charged against real property are delinquent the treasurer shall have the right, and it shall be his duty, upon demand and payment of the taxes and interest, to make out and issue a certificate or certificates of delinquency against such property, and such certificate or certificates shall be numbered and have a stub, which shall be a summary of the certificate, and shall contain a statement:

"(1) Description of the property assessed.

"(2) Year or years for which assessed.

"(3) Amount of tax and interest due.

"(4) Name of owner, or reputed owner, if known.

"(5) The rate of interest the certificate shall bear.

"(6) The time when a deed may be had, if not sooner redeemed."

"Section 1751. Any time after the expiration of three years from the original date of delinquency of any tax included in a certificate of delinquency, the holder of any certificate of delinquency may give notice to the owner of the property described in such certificate, that he will apply to the Superior Court of the County in which such property is situated for a judgment foreclosing the lien against the property mentioned herein. Such notice shall contain:

"1. The title of the court, the descrip-

tion of the property, and the name of the owner thereof, if known, the name of the holder of the certificate, the date thereof, and the amount for which it was issued, the year or years for the delinquent taxes for which it was issued, the amount of all taxes paid for prior or subsequent years, and the rate of interest on said amount.

"2. A direction to the owner summoning him to appear within sixty days after service of the summons, exclusive of the day of service, and defend the action or pay the amount due, and when service is made by publication a direction to the owner summoning him to appear within sixty days after the date of said first publication, and defend the action or pay the amount due.

"3. A notice that in case of failure so to do, judgment will be rendered foreclosing the lien of such taxes and costs against the land and premises named.

"4. The summons shall be subscribed by the holder of the certificate of delinquency or some one in his behalf and residing within the State of Washington, and upon whom all process may be served.

"Section 1751½. The County prosecuting attorney shall furnish to holders of certificates of delinquency, at the expense of the county, forms of applications for judgment, forms of summons and forms of publication notices

when the same are required, and shall prosecute to final judgment all actions brought by holders of certificates under the provisions of this act for the foreclosure of tax liens, when requested so to do by the holder of any certificate of delinquency.

"Section 1751b. After the expiration of five years from the date of delinquency, when any property remains on the tax roll for which no certificate of delinquency has been issued, the county treasurer shall proceed to issue certificates of delinquency on said property to the county, and shall file said certificates when completed with the clerk of the court, and the treasurer shall thereupon, with such legal assistance as the county commissioners shall provide in counties having a population of thirty thousand or more, and with the assistance of the county prosecuting attorney in counties having a population of less than thirty thousand, proceed to foreclose in the name of the county, the tax liens embraced in such certificates, and the same proceedings shall be had as when held by an individual; Provided, that summons may be served or notice given exclusively by publication in one general notice, describing the property as the same is described on the tax rolls.

"Said certificates of delinquency issued to the county may be issued in one general certificate in book form including all property, and the proceedings to foreclose the lien against

said property may be brought in one action and all persons interested in any of the property involved in said proceedings may be made co-defendants in said action, and if unknown may be therein named as unknown owners, and the publication of such notice shall be sufficient service thereof on all persons interested in the property described therein. The names of the person or persons appearing on the treasurer's rolls as the owner or owners of said property for the purpose of this act shall be considered and treated as the owner or owners of said property, and if upon said treasurer's rolls it appears that the owner or owners of said property are unknown, then said property shall be proceeded against, as belonging to an unknown owner or owners as the case may be, and all persons owning or claiming to own, or having or claiming to have an interest therein, are hereby required to take notice of said proceedings and of any and all steps thereunder."

"Section 1756. The court shall examine each application for judgment foreclosing tax lien, and if defense (specifying in writing the particular cause of objection) be offered by any person interested in any of said lands or lots to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner, without other pleading, and shall pronounce judgment as the right of the case may be. * * * * *

"The court shall give judgment for such

taxes, assessments, penalties, interest and cost as shall appear to be due upon the several lots or tracts described in said notice of application for judgment or complaint, and such judgment shall be a several judgment against each tract. * * * * *

"The person at such sale offering to pay the amount due on each tract or lot for the least quantity thereof shall be the purchaser of such quantity which shall be taken from the east side of such tract or lot, and the remainder thereof shall be discharged from the lien. * * * * * * The County Treasurer shall execute to the purchaser of any piece of land a tax deed. The deed so made by the County Treasurer, under the official seal of his office shall be recorded in the same manner as other conveyances of real estate, and shall vest in the grantee, his heirs and assigns, the title to the property therein described without further acknowledgment or evidence of such conveyance."

"Section 5500. Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the Superior Court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title."

"Section 5678. Hereafter no action or proceeding shall be commenced or instituted in any court of this state to enjoin the sale of any property for taxes, or to enjoin the collection of any taxes, or for the recovery of any property sold for taxes, unless the person or corporation desiring to commence or institute such action or proceeding shall first pay, or cause to be paid, or shall tender to the officer entitled under the law to receive the same, all taxes, penalties, interest, and costs, justly due and unpaid from such person or corporation on the property sought to be sold or recovered."

BRIEF ON JURISDICTIONAL QUESTION.

The facts bringing the case within the jurisdiction of this court, are that in the state court there was drawn in question the validity of an authority exercised under the state, on the ground of its being repugnant to the constitution of the United States, and that the decision was in favor of its validity. These facts are doubly authenticated; (1) they are necessarily to be inferred from the pleadings, evidence and judgment; (2) they are shown by a record entry of the state court of

last resort, made after its judgment, and prior to the issuance of the writ of error from this court.

FIRST.

That the Federal Question Was Raised and Decided in the State Court Is a Necessary Inference from the Facts Disclosed in the Record.

The Washington tax proceeding is a proceeding *in rem*.

Williams vs. Pittock, 35 Wash. 271 77 Pac. 385.)
Spokane vs. Abitz, 80 Pac. 192.
Carson vs. Titlow, 80 Pac., 299.
Allen vs. Peterson, 80 Pac., 849.
Rowland vs. Eslund, 82 Pac., 599.

And see the Washington statutes quoted *infra*.

The divestment of title through such a proceeding is manifestly impossible without a description of the property affected. The legal import of the allegations in the reply, that the land in question was not described in any of the tax pro-

ceedings was of course that there was no description of the land which served to identify it with the degree of certainty requisite in such a proceeding. Whether a given tract of land can be considered as described in a given document must largely depend upon the nature of the document. Deeds, wills, powers of attorney, legal citations, judgments, tax proceedings, etc., all have their more or less distinctive standards of certainty, by the application of which the question of description or no description must be determined. These standards varying largely according to the functions of the document or proceeding and the strictness or liberality with which it is to be construed. In the case of tax proceedings, claimed to have worked a divestment of title, the minimum degree of certainty which can be legally exacted is that which is necessary to constitute due process of law. The pleadings and evidence disclose a controversy as to whether certain descriptions which appeared in the tax proceedings should be deemed applicable to these lands, *i. e.*, whether they identified ~~lots~~ th lands with the degree of certainty requisite in such proceeding. (Fols. 21, 26, 27, 31, 41, of record and Plaintiff's Exhibit 5.)

It is impossible to believe that any court could entertain such a question without actually adverting to, and considering, what degree of certainty

is necessary in such a description, in order to constitute due process of law. The nature of the controversy as disclosed by the pleadings and testimony necessitates this conclusion as a pure inference of fact. We are speaking not of what the court ought to have considered, but of what it is necessary to infer from the nature of the issues and the testimony, it *actually did* consider. It is equally unsupposable that the limitations upon "process of law" should be applied by any court at the present day in unmindfulness of the guaranty of the Fourteenth Amendment to the federal constitution. In the legal mind, the amendment is too inseparably linked to the idea and phrase "due process," to permit of such a supposition.

The decisions are many, not only that the federal constitution need not in terms be appealed to, but that no direct reference to it need have been made even in argument. It is enough that the general nature of the issue is such as to justify the inference that the state court's attention must have been attracted to, and exercised upon, the federal question.

Eureka Lake Co. vs. Yuba County, 116 U. S. 410, 415, is in principle the exact counterpart of the case at bar. The writ was for the review of a state judgment alleged to have been rendered

without due notice or citation, the objection being there to the *service* of the citation while our objection is to its contents. Although no reference to the federal constitution had been made in either court of the state, jurisdiction was sustained; undoubtedly for the reason that the state court could not be supposed to have considered the sufficiency of a citation to support a judgment without adverting to the essentials of "due process", and to its federal guaranties. It was necessary to infer that the federal question *must* have been actually considered. The principle of the decision seems not to have been brought very clearly to light in the brief opinion that was rendered, but it is respectfully submitted that the foregoing principle is the only one upon which the decision can be explained and justified, or through which it can be brought into harmony with the general doctrines of the court. But however this may be the case is undeniably identical with ours. This construction of the case also seems to be that which was placed upon it by the court when it was grouped with other cases applying the same rule in 142 U. S., at page 269.

In *Wilson vs. Blackbird Creek Co.*, 2 Pet. 245, 250, 251, no reference to the federal constitution appeared in any part of the record, yet from the

general nature of the controversy, involving as it did a claim of right in a navigable stream under an act of state legislation, the court considered it

> "Impossible to doubt but that the constitutionality of the act, was the question and the only question, which could have been discussed in the state court. That question must have been discussed and decided."

In *Craig vs. Missouri*, 4 Pet. 410, 428, 429, it was nowhere in the record directly disclosed that the act of the state legislature was drawn in question as repugnant to the constitution. Yet the nature of the controversy, the facts found, etc., lead the court to say:

> "It is impossible to doubt that in point of fact, the constitutionality of the act under which the certificates were issued that formed the consideration of this note, constituted the only real question made by the parties, and the only real question decided by the court. But the record has to be inspected with judicial eyes; and, as it does not state in express terms that this point was made, it has been contended, that this court cannot assume the fact it was made or determined in the tribunal of the state. The record shows distinctly that this point existed, and that no other did exist;

the special statement of facts made by the court as exhibiting the foundation of its judgment contains this point and no other. The record shows clearly that the cause did depend, and must depend, on this point alone * * * It is sufficient if the record shows that the constitution or a treaty or law of the United States *must* have been considered or that the constitutionality of a state law *must* have been questioned; and the decision has been in favor of the party claiming under such law."

In *Harris vs. Dennia*, 3 Pet. 292,301,302, there was not upon the record any reference to a supposed repugnancy of a state law to an act of Congress. Jurisdiction was sustained, because, from the facts marshalled in a special verdict, this court was satisfied that the verdict must have been framed with a view to the presentation of such a question.

Again, in *Satterlee vs. Matheuson*, 2 Pet. 380,-409,410, where the federal question relied upon as conferring jurisdiction was the repugnancy of a state statute to the constitution of the United States, the state record contained no reference whatever to such alleged repugnancy, yet the state court having given the state statute in charge to

the jury, with the instruction that it was binding upon them, this court regarded it as manifest, under all the circumstances of the controversy, that the constitutionality of the legislative act had been actually considered and determined.

The same principle, we respectfully submit, underlies the decision in *Kaukaune Co. vs. Green Bay Canal,* 142 U. S. 254,269, where the above cited cases from 2 Pet. 245 and 116 U. S. 410, are relied upon as authority. The controversy related to the use of certain waters of the Fox River, one party claiming them as an incident of his riparian ownership, the other claiming them as the grantee of the state, under an act of the legislature reserving to the state and its grantees, all the water powers raised by dams built for the improvement of the river's navigation. The records of the state court disclosed no reference to any constitutional question, yet as the waters in question had manifestly once belonged to the riparian owner, and as they now manifestly belonged to the grantee of the state, unless the act reserving the water powers to the state was repugnant to the federal constitution as a taking of private property without compensation, it was deemed necessary to infer that the very point upon which the litigation thus manifestly hinged had been actually considered and decided.

So in *Columbia Water Power Co. vs. St. Ry. Co.*, 172 U. S. 475, 485, in like absence from the record of all reference to the federal constitution or to the legislative impairment of contracts, jurisdiction was sustained, because, reading all the pleadings together, the court was satisfied from the manner in which the contracts relied upon by the several parties, and certain legislative acts had been set up, that the litigants and the court must have had in mind the question of legislative impairment, and that the court must have considered and decided the questions so palpably involved.

So in *Yazoo, etc., Co. vs. Adams*, 180 U. S. 1, there was no suggestion of the constitutional prohibition against the legislative impairment of contracts; and the state courts appeared to have busied themselves exclusively with matters relating to the construction or meaning of certain state legislative contracts. Yet because, from all the circumstances of the case, this court was satisfied that the state court had construed those legislative contracts with a view to passing upon the question of their impairment if it became necessary to do so, held the question of legislative impairment actually present and under consideration, so as to justify a review by this court of the entire federal question, includ-

ing the construction of the state legislative contracts.

So in *Furman vs. Nichols*, 8 Wal. 44, it was held that by *necessary intendment* the constitutionality of state legislation tending to impair the obligation of a contract was the very point which had been litigated and decided though nowhere directly referred to in the record.

The fact that all the cases hereinbefore cited constitute a continuous series, is slightly obscured by the circumstances that in some of them, as in Eureka Lake Co. vs. Yuba County, 116 U. S. 410, 415, there is a failure to state just what the principle of the decision is, and that in the form of the statement of that principle, there is a divergence between the earlier cases and the later. Throughout the period of Chief Justice Marshall, the ground usually assigned was that from all the circumstances, it was "impossible to doubt" that though nowhere in terms referred to in the record the federal question "must have been" raised and considered; *i. e.*, the question was so obviously present that it could not be supposed to have been overlooked. In the later cases there has been a disposition to describe the principle, as being, that the federal question was "necessarily involved." While this seems to be a less satisfactory because

more equivocal form of statement, analysis of the cases, shows conclusively that it is intended to mean exactly what the older formula meant, viz: that the presence of the federal question was so palpable that its actual consideration was a necessary inference. In other words, the consideration of the federal question is proven circumstantially, rather than by direct attestation.

SECOND.

The Efficacy of the Record Entry of the Raising and Decision of a Federal Question.

Three weeks after the decision of this case by the supreme court of Washington, and two weeks before the issuance of the writ of error from this court, the state court caused to be made upon its records an entry certifying that on the hearing of the case there, certain specified federal questions were raised and decided. That entry is certified by the clerk of the state court as a part of the record and is as follows: (Fols. 135-137 Record.)

STATE OF WASHINGTON, IN SUPREME COURT.

THE ONTARIO LAND COMPANY,

Respondent.

Against

JAY YORDY, ET AL,

Appellants.

CERTIFICATE OF FEDERAL QUESTION.

On motion of the above named Ontario Land Company, in the above entitled appeal, this Supreme Court of the State of Washington, hereby orders it to be certified and made a part of the record in this case, and the Hon. Hiram E. Hadley, Chief Justice of said Supreme Court, does now certify, that in said cause and on the hearing before this court, it was claimed, contended and alleged by the said Ontario Land Company, that to give the force and effect to the tax judgment and tax deed involved in said cause and referred to in the record and opinion of this Court, of divesting the title of said Ontario Land Company to the lands in its complaint described, is to divest said Ontario Land Company of its said property "without due process of law" in contravention of the Fourteenth Amendment to the Constitution of the United States, which provides that "no state shall deprive any person of his property without due process of law."

That the reasons assigned by said Ontario Land Company for its said contentions were, that to constitute proper notice under said 14th amendment, in a tax proceeding *in rem*, the description of the property sought to be taken and sold for the tax, must be so full as to be intelligible to persons of ordinary intelligence, and that the description of lands in question in the tax summons notice, judgment and tax deed involved herein, was wholly insufficient for the purpose of notice under said 14th amendment, and that because of such contention and claim, it became and was material to the said cause for this Court to determine whether the said tax summons notice, tax judgment and tax deed, involved in said cause, were repugnant to the aforesaid provision of the 14th Amendment of the Constitution of the United States, by reason of the alleged insufficiency of description of the property, and whether the tax judgment and tax deed therein involved deprived said Ontario Land Company of its property "without due process of law," in violation of said 14th amendment by reason of the alleged insufficiency of description aforesaid; and the decision of this Court was in favor of the validity of said tax judgment and tax deed and was adverse to the aforesaid claims of said Ontario Land Company, and this Court decided, that said tax summons notice, tax judgment and tax deed, were not repugnant to said 14th amendment by reason of said alleged defects in the

description of said property, and therefore did not deprive said company of its property "without due process of law" in violation of said 14th amendment. That it was further claimed, contended and alleged by the said Ontario Land Company in said cause in this court, that the judgment of the Superior Court for the County of Yakima in said tax proceedings, and the sale of said land thereunder, were void and did not constitute "due process of law," for the reason that no notice was given to said Ontario Land Company of the pendency of said action, and said judgment was rendered without a hearing or an opportunity to be heard; that the publication of notice of said action was made in November and December, 1901; that at the time such publication was made and at the time the owner of said land was notified to appear and defend said action, there was no action pending in said court; that the complaint (called in the proceedings the Application for Judgment) was not filed in court and no action was commenced therein, until September 2, 1902, on which day the complaint was filed, and judgment rendered against said property. That because of such claim and contention it became and was material to the said cause for this Court to determine, whether said judgment in said tax proceeding and the sale made pursuant thereto, were repugnant to the aforesaid provision of the 14th Amendment of the Constitution of the United States, by reason of the alleged lack or insufficiency of the

notice to the property owner of the proceedings in said court against his property, and whether said judgment and sale in the tax proceedings therein involved deprived said Ontario Land Company of its property without due process of law, by reason of such alleged insufficiency of the notice of the pendency of such proceedings; and the decision of this Court was in favor of the validity of said judgment and sale and was adverse to the aforesaid claims and contentions of said Ontario Land Company, and that said tax proceedings and the judgment therein rendered and the sale had and made thereunder constituted due process of law and were not repugnant to said 14th amendment, and that therefore they did not deprive said company of its property "without due process of law" in violation of said amendment.

IN WITNESS WHEREOF, the Supreme Court aforesaid has caused this certificate to be duly sealed with its seal, and the said Chief Justice has hereunto set his hand this 30th day of January A. D. 1907.

(Signed) HIRAM E. HADLEY,
Chief Justice of Supreme Court,
State of Washington.

6233 Original. The Ontario Land Company Respondent vs. Jay Yordy, et al. appellants. Certificate of Federal Question filed Jan. 31, 1907. C. S. Reinhart, Clerk."

Such a record entry made by order of the court, stating that certain questions not referred to in the opinion, were raised at the hearing, considered by the court and adversely decided, performs so exactly the offices of an opinion that it may, with entire propriety, be treated as a supplement to the principal opinion already filed. As such it furnishes sufficient evidence that the federal question was relied upon and adversely decided by the state court in case at bar.

Rector vs. City Deposit Bank, 200 U. S. 405, 412.

The foregoing entry is certified to this court as a portion of the record in the case. Being thus a certified record of the state court as distinguished from the certificate of a chief judge, the case is governed by the principle of the decision in Marvin vs. Trout, 199 U. S. 212, where the distinction between the two classes of certificates was applied, and where jurisdictional facts evidenced by such a record entry were held sufficiently established.

The entry certified in this case will also be seen to conform in every particular to the requisitions of the well considered decision, in

Armstrong vs. Treas. of Athens Co., 16 Pet. 281, 285.

In that case the jurisdiction was sustained although confessedly the record certification of the federal question made by order of the court, was the only evidence that the question had been actually raised or decided. In enumerating the conditions that will justify the exercise of jurisdiction under the 25th section of the Judiciary Act, (now Sec. 709 of the Revised Statutes), the Court, at page 285, lays down the following as its fourth proposition:

> "Or, fourthly, it must be entered on the record of the proceedings in the appellate court, in cases where the record shows that such a point may have arisen and been decided, that it was in fact raised and decided; and this entry must appear to have been made by the order of the court, or by the presiding judge by order of the court, and certified by the clerk as a part of the record in the state court."

The power of the state court to make such an entry upon its record for the purposes of federal review, had been tacitly recognized in the earlier case of *Williams vs. Norris*, 12 Wheat, 117, 120, 121, where the court refused to act upon a similar entry, upon the sole ground that it had been made after the federal writ of error had withdrawn from the state court its control over the case.

So in *Commercial Bank vs. Buckingham's Executors*, 5 How. 317, 341, the state court by a certification of its record entry was shown to have overruled the contention of plaintiff in error that the obligation of his contract had been impaired by state legislation. The case was treated by this court exactly as it would have been had the validity of the state statute been drawn in question by the pleadings. The holding was, that the plaintiff in error and the state court were mistaken in supposing that any federal question had been presented or was involved—that the claim of counsel that a federal question had arisen, did not make it so. No distinction was drawn between the force of the certificate and the force of other portions of the record. They proceeded simply upon the principle that the question must be determined through a fair interpretation of the entire record, and not from the statements of any particular part of it. That there was any intention to discriminate against the force or authority of the certified record entry as a part of the record was expressly disclaimed in a subsequent reference by the court to this decision. (14 How. at p. 153.) The court there explain that in the Commercial Bank case, jurisdiction was denied,

> *"Not because we did not think that the certificate was a part of the record,* or that it did not show sufficiently the act which the plaintiffs in error alleged could not be applied in that case without impairing the obligation of a contract, but because we thought, from our view of the entire record, that the only question which was raised on the trial of the case in the state court was one of construction of two Ohio statutes."

The attitude of the court was the same in *Lawler vs. Walker,* 14 How. 149, where at page 155, *Armstrong vs. Treas. of Athens Co.,* 16 Pet. 281, was cited, and its doctrine applied. Again the certified record entry was treated and declared a part of the record, and jurisdiction was again denied solely upon the strength of the distinction between a federal question actually involved and a mere erroneous supposition of counsel that such question was involved. In the language of the court, the federal question although raised, was not "rightly raised." There was no intimation that the certified record entry was any less efficacious than any other portion of the record.

To the same class belongs *R. R. Co. vs. Rock* 4 Wal. 177, where jurisdiction was sought to be sustained upon a certificate of federal question

said (p. 179) to be in form and substance like that in the Armstrong case. The dismissal for want of jurisdiction, was made without recourse to any theory that such a certificate was necessarily inadequate to confer jurisdiction. As in the two preceeding cases, the reasoning was the same as would have been followed had the appeal to federal protection been made in the pleadings, viz: That it does not necessarily follow that a federal question was involved because counsel insisted that it was, or because the state court assumed that it was. (p. 180.) In this case there was the additional ground for dismissal, that from the entire record it appeared that the state court may have decided a question of local law which would have been decisive of the case without reference to the federal question. Even counsel for respondent seems not to have argued that the certified record entry was necessarily an inadequate basis for the exercise of jurisdiction, but to have urged only that "it would not of itself *conclude* the court on that matter." (p. 178.)

So in *Murdock vs. City of Memphis*, 20 Wal. 590, 633, the court, *arguendo*, speaking by Mr. Justice Miller, said:

"We have been in the habit of receiving

the certificate of the court, signed by its chief justice or presiding officer, on that point, though *not as conclusive.*"

These words of Mr. Justice Miller exactly characterize the attitude of the court toward these certificates down to the dicision in *Parmalee vs. Lawrence*, 11 Wal. 36. The court had been satisfied, and had found itself abundantly able, to protect itself in the exercise of its acknowledged right to determine for itself whether the suit involves a federal question, by treating a state court's certified entry of such a question simply as not *conclusive*, thus reserving to itself in every instance the power to accord to the certificate such weight as under all the circumstances of the particular case it might seem to merit. There had been no judicial intimation that such a certificate is essentially incompetent or inadequate as independent proof of the jurisdictional facts stated in it. The necessity for regarding the certificate as of less than conclusive force, arises from the fact that habitually, though not invariably, the matter certified fo, is in the nature of a question of combined law and fact. The legal element thus involved is always for this court finally to decide. Its control over that legal element, and indeed over the entire subject matter

of the certificate, is amply assured by the doctrine that it is not conclusive, without any resort to a theory of its *necessary insufficiency* as independent proof. The supposition that such a certificate is, standing alone, necessarily inadequate proof of the jurisdictional conditions, first appeared in Parmalee vs. Lawrence, above cited.

How extremely inconsiderate the decision in that case was, is manifest in almost every line of the opinion.

(1) It is first remarked (11 Wal, at p. 38), that in *Lawler vs. Walker*, 4 Wal. 177,

> "It is said that the 25th section of the judiciary act required something more *definite* than the certificate of the Supreme Court to give this court jurisdiction."

The criticism which in *Lawler vs. Walker*, was made upon the particular certificate there involved because of its indefiniteness in not identifying the particular statute of Ohio which was alleged to be unconstitutional, is thus strangely converted into an assumption of inadequacy inherent in the general nature of state court certificates.

(2) Words are then quoted from p. 152 of the decision in *Lawler vs. Walker,* apparently as implying that the federal question must appear in the pleadings, evidence, instructions or exceptions. A careful reading of the entire opinion in the Lawler case,—a due observance of the court's studied recognition of the certificate as a part of the record (p. 153), and the fact that the reasoning underlying the decision would, as hereinbefore noticed have been equally applicable if the claim to federal protection had been shown by the pleadings, and the fact that the court cited with approval the decision in the Armstrong case, can leave no doubt upon the mind that the words quoted from the opinion in the Lawler case were designed by Mr. Justice Wayne, who wrote therein, merely to vindicate the right of the court to determine from the pleadings, evidence, instructions and exceptions whether a federal question was actually present as insisted by counsel. And such, it will be noticed is the only purpose for which Mr. Justice Wayne used, in the Lawler case, the results of his examination of the pleadings, etc. It is a necessary condition to the efficacy of such a certificate, under the rule as originally formulated in the Armstrong case, that the federal question should be one which "*may*" have arisen. In determining whether the question is one which may have arisen, the certifi-

cate is undoubtedly of no evidential force whatever, that question being soluble only by reference to the pleadings and other proceedings anterior to the decision.

(3) The decision in *R. R. Co. vs. Rock*, 4 Wal. 177, is then cited as an authority, although as hereinbefore noticed, it contains no trace of the doctrine as to the necessary insufficiency of the certificate as distinguished from its inconclusiveness.

(4) The court then assigns its own reason for its conclusion in the following words:

> "We will add, if this court should entertain jurisdiction upon the certificate alone in the absence of any evidence of the question in the record, then the supreme court of the state can give the jurisdiction in every case where the question is made by counsel in the argument."

If by "the absence of any evidence of the question in the record," was meant the absence of any evidence in the record that the question was one

that *may have been raised, i. e.*, the raising of which would have been justified by the facts of the case, the proposition would be true; for confessedly, the certificate can never be effectual as to any question unless from other portions of the record it appears that the certified question was one "that *may* have been raised in the case. If, on the other hand, the reference was to the absence from the remander of the record of any evidence that the federal question was *actually* raised and decided, then the statement is refuted by what the court did in each of the above two cases, which were cited as authority in the Parmalee opinion, and also by the case of Buckingham's Executors, *supra*, for in each of them, as hereinbefore noted, counsel for plaintiff in error raised what he insisted was a federal question, and the state court attested the raising and the decision of it; yet this court had no difficulty in protecting itself in its right to judge of the conditions of its own jurisdiction, by simply treating the certificate as *not necessarily conclusive*, and without recourse to any theory of the inferiority of the certificate to other portions of the record, or any intimation of its *essential insufficiency* to confer jurisdiction. This was accomplished by resort to the same reasoning adopted in the many cases of which the following are examples, where no certificate was in-

volved, and where the supposed federal question was raised in the pleadings.

New Orleans vs. Louisiana, 185 U. S. 336, 343,
French vs. Taylor, 199 U. S. 274.
Costillo vs. McConnico, 168 U. S. 674.
Iowa Central vs. Iowa, 160 U. S. 389,
Sawyer vs. Piper, 189 U. S. 154,
New Orleans vs. N. O., 142 U. S. 79.
St. Joseph vs. Steele, 167 U. S., 661 662.

We respectfully submit, therefore, that in the Parmalee case, the decision was improvident, and that each of the several propositions of the opinion were untenable.

Brown vs. Atwell, 92 U. S. 327, 328-330, is the only case in which the doctrine of the Parmalee decision has been applied to what, by the published reports, clearly appears to have been the certification of a record entry of a federal question, as distinguished from a mere judge's certificate. In the reports, the certificates in all the other cases are described as the certificates of the chief justices.

At the time of the decision of the Parmalee

case, the attention of the court had not been called to the changes made in the 25th section of the judiciary act through the implied repeal of certain of its clauses by the act of 1867.

Murdock vs. City of Memphis, 20 Wal. 590, 594, 614.

That repeal bore upon the doctrine of the Parmalee case in two ways:

(1) As was intimated by the court, speaking through Mr. Justice White, in *Rector vs. City Deposit Bank*, 200 U. S. 405, 412, a record entry of the raising and decision of a federal question, is in the nature, and has the force, of an opinion of the court. Had the state court, before the issuance of the write of error in the case at bar, filed a supplemental opinion stating that certain specified federal questions had been raised at the hearing by plaintiff in error, and had been considered and adversely decided by the court, though reference to them had been inadvertently omitted in the original opinion, it would hardly have been contended that any less verity or dignity should be accorded to the supplemental opinion than to the original. Is the authentication of these material facts any

less efficacious because incorporated by the court into the record rather than into the opinion; or are the facts themselves for that reason any less weighty. The viewing of the subject from this decisive standpoint was of course impossible so long as the court was acting under the clause in the old judiciary act, restricting it to the correction of errors "appearing upon the face of the record," and so impliedly prohibiting recourse to the opinion of the court in this connection, because not a part of the record. It is a standpoint which has become accessible since the Parmalee case was decided, for as explained in Murdock vs. City of Memphis above cited, the restrictive clause of the judiciary act was treated by the court as in force until the decision of the Murdock case in 1874, four years after the Parmalee case was decided. But since the act of 1867 has been recognized as having repealed the restriction to the face of the record, the opinion, and such an entry as this as being essentially a part of it, has become competent and weighty evidence of the points raised and decided.

(2) In another way, equally pronounced perhaps, the question was affected by the act of 1867. There is a strong probability that no one consideration was more conducive to the views expressed in the Parmalee case, than a feeling that it was

hardly consistent with the clause of the judiciary act restricting federal review to the correction of such errors as appeared "*upon the face of the record*," that the state courts should be able to enlarge the federal jurisdiction by voluntarily incorporating into the record, matters such as the claims of counsel on argument or in brief, which were not properly a part of the record, or a subject-matter for it, by the standards of either the common law or the state practice. It was not strange that the positions of the court should become somewhat unstable under the influence of such a misgiving. Whatever foundation there may have been for it, of course, disappeared with the repeal of the restrictive clause by the act of 1867.

It seems probable also that the entertainment of jurisdiction in exclusive reliance upon the certified record entries of the raising and decision of federal questions in the state courts, may at one time have been regarded with disfavor, from the fact that from the nature of the case such certificates invariably disclose only that the federal matter was drawn in question during the course of the hearing in the state court of last resort. Doubts seem to have existed for a considerable time whether such an appeal for federal protection, merely by way of argument in a court of last resort, should be regarded as seasonable, or as such

a "drawing in question" of the federal matter as was contemplated by the statute.

All doubts of that character have been removed by the decisions accepting as decisive the action of the state court in treating the appeal to federal protection as not too late, even though first made on motion for re-argument. (*Mallett vs. North Carolina*, 181 U. S. 589, 592, *Fullerton vs. Texas*, 196 U. S. 193, *Corkran Oil Co. vs. Arnaudet*, 199 U. S. 182). And by those holding that even under the third clause of the federal statute, requiring federal rights, immunities, etc., to be "specially set up and claimed," the action of the state court in considering and deciding a federal question will be accepted as decisive that it was sufficiently set up and claimed within the meaning of the statute.

Haire vs. Rice, 204 U. S. 291, 299.

In the case at bar, it is shown by a document which is at once a record, and in the nature of a supplemental opinion, that the state court entertained, considered and decided adversely, a claim made and relied upon by plaintiff in error, that the tax judgment and tax deed upon which respondents rested their title, would, if recognized as valid, take the property of plaintiff in error without due pro-

cess of law, contrary to the 14th amendment of the federal constitution. No doubt can be supposed to exist that the case was one in which this federal question *may* have been raised. The question lay upon the face of the controversy, which manifestly could not be completely considered or accurately decided without reference to it. The allegations in the reply of plaintiff, that this land was not described in either the tax judgment or tax deed, meant necessarily that it was not described within the meaning of the law which determines the degree of certainty requisite in documents of that kind. What constitutes a description varies with the character of the document. In these tax proceedings (*in rem* as they were), an adequate description of the land was the first requisite to their becoming due process of law. Reliance upon the guaranty of the fourteenth amendment was not only natural and proper,—the court can see that it was inevitable. If the plaintiff in error relied upon it, and his claim with reference to it was held untenable, all the conditions of federal jurisdiction exist. Under the solemnities of its record, its seal, and the signature of its chief judge, the state court authenticates these pure matters of fact, necessarily within its personal cognizance, disentangled from all possibilities of legal misconstruction. Could it be justly said that its authentication has

been treated with great respect, if in the absence of special grounds of distrust or of counter-evidence in the record, it should be held inadequate to establish these matters of pure fact.

THIRD.

Under the fourth heading of our brief upon the merits, we shall urge that the judgment itself rendered in this case by the Supreme Court of Washington, is unsupported by due process, in that,

(1). *It awarded to Defendants affirmative relief upon a distinct cause of action which had not been pleaded, and to which therefore the jurisdiction of the court did not extend.*

(2.) *It assumes to supplant our title by force of a tax judgment and sale upon whose validity we were denied a hearing.*

From the nature of the case neither of these objections to the judgment, could have been urged before its rendition, since the Defendants having

pleaded no counterclaim, and having prayed for no other relief than dismissal, there was nothing to suggest the possibility of such a judgment as was finally sprung upon us. If, however, the judgment involved a departure from due process, the constitutional guaranty was present forbidding it, and the question thus arises whether in so peculiar a case, relief here is barred by the requisition of the federal statute that the impugned authority exercised under the state, must have been "*drawn in question*" in the state court. Upon that subject we submit the following considerations.

Until the decision in *Crowell vs. Randall*, 10 Pet., 368, 392, it seems to have been the accepted doctrine of the court, that within the meaning of the judiciary act, an authority exercised under a state, was drawn in question for repugnancy to the federal constitution, whenever the litigation disclosed a situation involving or exhibiting such repugnancy; *i.e.*, whenever the facts presented fairly called for the consideration of such a question. In *Crowell vs. Randall*, the progress of this doctrine was arrested by an opinion in which Mr. Justice Story undertook to explain that some of the court's utterances on the subject had been too broadly construed by the bar. The explanation seems however to have been in the nature of an expedient for re-

crossing the Rubicon, since after the manoeuvre was accomplished, it was freely admitted that the doctrine of the court had undergone a change. In explaining in *Maxwell vs. Newbold,* 18 How., 511, 515, why it was that the court abandoned the position upon this subject—which he justly admits it had occupied under Chief Justice Marshall, Chief Justice Taney says that the old rule was found by experience to be unsafe, since

> "It might sometimes happen that although in one view of the subject an act of congress or a clause of the constitution might be applicable to a case, yet the state court might have decided upon principles of state law, altogether independent of any provision in the constitution or law of the United States, and in nowise in conflict with either."

The relation between the cause thus assigned, and the effect, is not very satisfying, but it is noteworthy that the change is ascribed not to any stringency in the wording of the statute, or to any supposed departure from its letter in the earlier decisions. The considerations relied upon are purely prudential. Under the circumstances, it seems safe to say, that the principle underlying the present doctrine of the court, has no reference to

the particular wording of the statute, but is identical in all respects with that which supports the more general doctrine that a litigant cannot upon the trial of his cause overlook a material rule of law, and then on review, impute the oversight to the error of the court.

Edwards vs. Elliott, 21 Wal., 532, 558.
Wilson vs. McNamee, 102 U. S., 572.
Robinson & Co., vs. Belt, 187 U. S., 41, 50.
Insurance Co. vs. Mordecai, 22 How., 111, 117.
National Bank vs. Commonwealth, 9 Wal., 353.
Wheeler vs. Sedgwick, 94 U. S., 1.
Clarke vs. Fredericks, 105 U. S., 4.
Cornell vs. Green, 163 U. S., 75, 80.
Ansbro vs. U. S., 159 U. S., 695.
Pine River Co., vs. U. S., 186 U. S., 279, 289.
Chicago, etc. Ry. Co. vs. McGuire, 196 U. S., 132.

The object of the rule is to ensure diligence on the part of litigants and to prevent *unnecessary* re-trails. The rule proceeds upon the theory of dereliction in the appealing party. It therefore has no application where, as here, the judgment

was so remote from the pleadings, so gratuitous on the part of the court, and so incredible, that no diligence could have anticipated its possibility. The reason thus failing, the rule fails with it.

Moreover it appears from the record that this matter was actually drawn in question by the petition for reargument. (See 5th paragraph of the Petition, fol. 122, of Record). The affirmative adjudication of the validity of the tax title and of its divestment of Plaintiff's title, are there expressly charged to have been in violation of the due process of law clause of the Fourteenth Amendment. The petition for reargument was denied (fol. 110). The general doctrine of the Court, that the raising of a federal question on motion for re-argument, is too late, unless the question so raised is actually entertained and passed upon by the State Court, manifestly rests upon the assumption that the party claiming to have been aggrieved, was derelict in not drawing the matter in question at an earlier stage of the proceeding. The doctrine can have no application therefore, where, as here, there was nothing in the pleadings to suggest the possibility of such a judgment, as that which the court gratuitously snapped upon us. To have discussed the possibility of such a judgment at any time prior to its rendition, would have been a positive impertinence. Now, the general doctrine as to the

unreasonableness of a federal question first raised on motion for reargument, is a legitimate expedient for enforcing diligence and good order in litigation; but if so extended as to cover federal questions which no diligence could have seen or foreseen, because not actually present under the pleadings or until injected gratuitously by the offending judgment, it would become an instrument of gross oppression, and would make the statute nugatory in the very class of cases calling most loudly for its vigorous enforcement.

FOURTH.

Reply to Counsel's Argument for Dismissal.

(A) It is said by counsel that the State Court's certificate or record entry of the raising of a federal question, must be supposed to refer to matters which happened in connection with the motion for re-argument, because, as he very laboriously argues, our brief on the original hearing, of which he submits a copy, fails to allude to the federal question, which we now present.

(1). It is not material whether the certificate be construed as proposed by counsel or not. It certifies that questions indubitably of the prescribed federal character, were not only raised, but were considered upon their merits and decided adversely. The authorities are uniform, that the raising of the federal question, even on motion for re-argument, is not too late, if the State Court sees fit to entertain and adjudicate it, as by such a construction of the certificate it appears to have done in this instance.

Mallett vs. North Carolina, 181 U. S., 589-592.
Leigh vs. Green, 193 U. S., 79-85.
Missouri vs. Elliot, 194 US. S., 530-534.
Fullerton vs. Texas, 196 U. S., 193.
Cockran Oil Co. vs. Arnoudet, 199 U. S., 182-193.

(B). It is not permissible, however, to suppose the state court ignorant or unmindful of the distinction between the *"hearing"* of a cause, and an argument on motion for a re-hearing; nor is there any other warrant for reading the certificate as meaning less than it plainly says. A brief is no part of the record, nor can it be referred to in

order to break the force of a certified record entry. Even if it were otherwise, and even though counsel's interpretation of the brief were not palpably unwarranted, it would be necessary to suppose that the federal matter was drawn in question in oral argument which would have been as efficacious as a discussion in the brief. For there is no trace of principle or authority for distinguishing in this regard between the two methods of directing the Court's attention to the fact that a point of federal law is involved. The federal question was obviously there, and the only question here is whether we overlooked it. Moreover, although this Court should concur in counsel's interpretation of the brief, and should decline to construe the certificate as having reference to points drawn in question in oral argument, the necessary inference would be that the state court had placed upon our brief the broader construction for which we contend, so that the brief did *in fact operate* to draw the federal matter in question, and to evoke the State Court's ruling upon it, which is enough.

But the entire strained argument by which the learned counsel seeks to curtail, behead, disembowel, and crumple up our appeal to the federal constitution, in the passage which he quotes at the top of page 21 of his brief in support of this motion, is in fact a clear case of misdirected, hyper-

critical ingenuity. By reference to that passage, it will be seen that our argument was, that the tax judgment and proceedings were inoperative upon our lands, because they nowhere described them; and that to accredit those proceedings, even as fortified by Section 1767 of 1 Ballinger's Code, defining the force of the tax deed, with the effect of divesting our title, would be to take our lands without due process within the meaning of the Fourteenth Amendment. The *"force"* of the Statute which was under discussion was its alleged force in imparting life and efficacy to the tax proceeding. No one was claiming that by the statute alone, our title had been divested. The point at issue was the combined force of the tax judgment, the tax deed, and the statute, and our contention that all combined were not due process, imported that none of them alone was, as the whole includes the half, and as above suggested, the state court's certificate indicates that they so understood us.

(C). It is also maintained by counsel, that the case was decided upon a proposition of State law, viz: that our lands were described with such certainty as to satisfy the requirements of the Washington Statute, regulating the enforcement of taxes.

But this claim necessarily falls with the other claim which we have shown to be untenable, *of which it is a mere corollary, viz*: that we did not raise the question whether the descriptions were such as to satisfy also the due process clause of the federal constitution. For if, as certified by the court, we did raise that question, then no matter how silent the court's opinion may have been with respect to it, our contention must be regarded as having been overruled. Under such circumstances the State Court could not, if it would, confine itself to a construction or application of the State Statute. If our federal point is well taken, it is necessarily controlling. The authorities relied upon by counsel in this connection are of course all cases, of which there are many, in which the federal question was such that its controlling character was lost upon the adoption by the State Court of a particular view of the State law. Such is not this case.

(D). In claiming that the answer of the defendants in error in the trial court entitled them to affirmative relief, because it set up an independent title based upon a tax deed, counsel has evidently overlooked Section 5509 Bal. Code, relating

to actions brought for recovery of possession of real property, which, reads as follows:

> "Sec. 5509. The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or license or right to the possession shall be set forth with the certainty and particularity required in a complaint. If defendant does not defend for the whole of the property, he shall specify for what particular part he does defend."

The plain requirements of that section forbid the inference that the mere pleading of their title in the answer, (as expressly required by section quoted), imports a pleading for *affirmative* relief. In view of the provision of that section, the pleading of the tax title by defendants was purely defensive; no counterclaim was set up, no affirmative relief was asked, dismissal only was prayed. (Fols. 10-17). In no sense was the right of defendants to affirmative relief in litigation or before the Court.

Respectfully submitted,

ARCADIUS L. AGATIN,
For Plaintiff in Error.

WILLIAM W. BILLSON,
Of counsel.

No. 59.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1902.

ONTARIO L. AND CONTRACT,
PLAINTIFF IN ERROR,
AGAINST
I. E. YOUNT, and
MINNIE E. YOUNT,
DEFENDANTS IN ERROR.

IN ERROR TO SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR PLAINTIFF IN ERROR.

ARCADIUS L. SCOTT,
For Plaintiff in Error.

WILLIAM W. ELLSON,
of Counsel.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM A. D. 1907

No. 277.

ONTARIO LAND COMPANY,
PLAINTIFF IN ERROR

AGAINST

J. E. YORDY and
MINNIE E. YORDY,
DEFENDANTS IN ERROR

IN ERROR TO SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR PLAINTIFF IN ERROR

ON THE MERITS.

ARCADIUS L. AGATIN,
FOR PLAINTIFF IN ERROR.

WILLIAM W. BILLSON,
OF COUNSEL.

HALLOCK'S "EDGEWATER PRESS"—DULUTH

BRIEF FOR PLAINTIFF IN ERROR ON THE MERITS.

STATEMENT OF THE CASE.

The writ is for the review of a final judgment of the Supreme Court of the State of Washington, upon the ground that an authority exercised under the state, the validity of which was drawn in question in the State Court, for repugnancy to the Constitution of the United States, was by the judgment erroneously held valid.

The action, which as permitted by the Washington practice, is one of ejectment and to quiet title, was brought by plaintiff in error, to whom the lands in controversy were shown by uncontroverted testimony to have been duly conveyed by the immediate grantee of the government's patentee. (Fols. 54-57 and 75-88 of Record.) Defendants' only claim of title was under a tax judgment and deed, concerning which it was contended by plaintiff, that they do not describe, or have reference to, the lots in controversy or to any tract of which they are a part. As disclosed by the testimony, the facts bearing upon this question of de-

scription, are as follows: Plaintiff's grantor having purchased from the government's patentee, the tract of which these lots are a part, caused it to be duly platted, May 27, 1889, as "Capitol Addition to North Yakima, Washington." (Fols. 56 and 88-90 and Plintiff's Exhibit 5,) and afterwards, May 24th, 1890, duly conveyed the platted tract to the plaintiff. (Fols. 56 and 86, 87 of Record.) Near the center of this plat, (Plaintiff's Exhibit 5, Fols. 88-90 of the Record), there was a large tract marked "*Reserved*" and not subdivided into either blocks or lots. Fourteen years later, September 27th, 1904, plaintiff duly platted and subdivided the said tract marked "Reserved," as "Heerman's Addition to North Yakima." (Fols. 56, 88-90 and plaintiff's Exhibit 6.)

The lands in controversy are a part of the said tract so originally marked "Reserved," and constitute lots 9, 10, 11, 12, 13, and 14, of Block 1, and lots 9, 10, 11, 12, 13, 14, 15 and 16, of Block 2 of said "Heerman's Addition to North Yakima," and are so described in the complaint. (Fols. 2 and 5.)

To prove title in themselves, defendants introduced in evidence a judgment of Sept. 2nd, 1902, of the Superior Court of Yakima County foreclosing a tax lien of the County for the taxes for 1892-3, upon blocks 352 and 372 of the Capitol Addition to North Yakima, and a tax deed of May 2nd, 1903

of blocks so numbered to Defendant Jay Yordy executed in pursuance of a sale had under said tax judgment. (Defendant's Exhibits "A" and "B," Fols. 100, 103 and 60-62.) The plat of "Capitol Addition to North Yakima," (Plaintiff's Exhibit 5 Fols. 88-90) shows that *there was never any such block as block* 352 *or as block* 372. *Neither was there any evidence or pretext that any part of either the platted or reserved tract had ever been known by such numbers.* The only reason assigned for supposing the descriptions in the tax judgment and deed to describe or cover the propery in controversy, is that *if* the tract marked "Reserved" upon the plat of "Capitol Addition to North Yakima" had been originally subdivided into blocks, and *if* the scheme of consecutive numbering disclosed by the plat had been extended over that tract, these lots in controversy *would have been* located in blocks that would have been numbered 352 and 372 respectively.

Subject to objections for immateriality, some evidence was also introduced by defendants, tending to show that prior to the tax judgment, it was understood by the manager of the plaintiff company, that the numbers 352 and 372 had in fact been used in the tax proceedings to designate portions of the tract marked *"Reserved."* (Fols. 64-69.) *There was no evidence of any record by any*

of the tax officers, indicating to what property it was, that the numbers 352 *and* 372 *were by them intended to be applied.* It was contended by plaintiff that since Washington real estate taxes are assessed and enforced against the property onl and do not import a personal obligation, it is an indispensable condition of their validity that they plainly describe the land taxed; and that to hold that the tax proceedings in question had divested title to lands which they had not described, would be to take property without due process of law within the meaning of the Fourteenth Amendment of the Federal Constitution; and that this result would not be changed, though plaintiff ha accidentally received information what property it was to which the tax officers intended that their impossible description should apply.

The trial court found as matter of fact, that the plaintiff had acquired the patent title to the lands in controversy, and that the tax proceedings relied upon by defendants contained no descriptions applicable to them, and as conclusion of law that plaintiff was entitled to relief prayed for; and judgment was so entered restoring plaintiff to possession and quieting its title as against defendants. (Fols. 39-46.) On appeal to the Supreme Court of the State, the judgment was reversed, *and a decree ordered quieting defendant's title* as against

the adverse claims of the plaintiff. (Fol. 109.) The lands were held to have been adequately described in the tax proceedings; (Fols. 105-108) and upon the ground that the plaintiff had not, prior ot the commencement of its action, made the tender of the delinquent taxes, which by section 5678 of Ballinger's Code and Statutes, of Washington, (hereinafter quoted) is made a condition precedent to the setting aside of a tax sale, (Fol. 109), the court declined to consider whether the tax judgment was jurisdictionally defective because of the failure to file in the clerk's office the certificate of delinquency and complaint or application for judgment. (See opinion as reported in 87 Pac. Rep. 257.) Upon this subject of tender, plaintiff's contention had been that the Statute could have no application, where, as here, the lands in controversy had not been described or included in any tax proceedings, and where consequently no taxes could be said to have been assessed, either regularly or irregularly, upon them, nor any tax judgment or deed to have been rendered or issued against them; that there was, in such case, merely an unfounded *claim* of assessment.

But in a way now to be noticed, the judgment of the Supreme Court of the State gives rise to a second question upon which plaintiff claims to be entitled to the judgment of this court. The plain-

tiff in its complaint after setting forth its own title had merely alleged that defendants were in the unlawful possession under a wrongful claim of some estate or interest in the land adversely to plaintiff. (Fol. 8.) Defendants had answered setting up their alleged tax title, (Fols. 12-16) and *praying dismissal, without affirmative relief.* (Fol. 17.) Plaintiff had replied denying that the lands in controversy were described in, or affected by, the tax proceedings, judgment, or deed, relied upon in the answer and setting up certain jurisdictional defects in said judgment. (Fols. 32, 33, 70-74.) Thus, the Supreme Court of the State, while as above noticed, holding the merits of the tax title not examinable, because tender had not been made of the delinquent taxes, at the same time assumed not only to adjudicate the merits of the case, but to transcend the relief prayed for by defendants, by ordering a decree quieting defendants' title (Fol. 109); thereby taking plaintiff's property without that opportunity to be heard upon the merits of the controversy, which is of the essence of due process.

Upon the special grounds assigned in the third heading of the brief on jurisdictional questions, it is submitted that this exercis of State authority also, was sufficiently drawn in queston as repugnant to the federal constitution, to be reviewable here.

MATERIAL PROVISIONS OF THE WASHINGTON STATUTES.

The following are the material provisions of the Washington tax laws, all the citations being from the 3rd or Supplemental Volume of Ballinger's Codes, except the first, which is from Volume 1 of the original work, and the last two, which are from Volume 2.

"Sec. 1749. Any day after the taxes charged against real property are delinquent the treasurer shall have the right, and it shall be his duty, upon demand and payment of the taxes and interest, to make out and issue a certificate or certificates of delinquency against such property, and such certificate or certificates shall be numbered and have a stub, which shall be a summary of the certificae, and shall contain a statement:

"(1) Description of the property assessed.

"(2) Year or years for which assessed.

"(3) Amount of tax and interest due.

"(4) Name of owner, or reputed owner if known.

"(5) The rate of interest the certificate shall bear.

"(6) The time when a deed may be had, if not sooner redeemed."

"Section 1751. Any time after the expiration of three years from the original date of delinquency of any tax included in a certificate of delinquency, the holder of any certificate of delinquency may give notice to the owner of the property described in such certificate that he will apply to the Superior Court of the County in which such property is situated for a judgment foreclosing the lien against the property mentioned herein. Such notice shall contain:

"1. The title of the court, the description of the property, and the name of the owner thereof, if known, the name of the holder of the certificate, the date thereof, and the amount for which it was issued, the year or years for the delinquent taxes for which it was issued, the amount of all taxes paid for prior or subsequent years, and the rate of interest on said amount.

"2. A direction to the owner summoning him to appear within sixty days after service of the summons, exclusive of the day of service, and defend the action or pay the amount due, and when service is made by publication a direction to the owner summoning him to appear within sixty days after the date of said first publication, and defend the action or pay the amount due.

"3. A notice that in case of failure so to do, judgment will be rendered foreclosing the lien of such taxes and costs against the land and premises named.

"4. The summons shall be subscribed by the holder of the certificate of delinquency or some one in his behalf and residing within the State of Washington, and upon whom all process may be served.

"Section 1751½. The County prosecuting attorney shall furnish to holders of certificates of delinquency, at the expense of the county, forms of applications for judgment, forms of summons and forms of publication notices when the same are required, and shall prosecute to final judgment all actions brought by holders of certificates under the provisions of this act for the foreclosure of tax liens, when requested so to do by the holder of any certificate of delinquency.

"Section 1751b. After the expiration of five years from the date of delinquency, when any property remains on the tax roll for which no certificate of delinquency has been issued the county treasurer shall proceed to issue certificates of delinquency on said property to the county, and shall file said certificates when completed with the clerk of the court, and the treasurer shall thereupon, with such legal assistance as the county commissioners shall provide in counties having a population of thirty thousand or more, and with the assistance of the countyl prosecuting attorney in

counties having a population of less than thirty thousand, proceed to foreclose in the name of the county, the tax liens embraced in such certificates, and the same proceedings shall be had as when held by an individual; Provided, that summons may be served or notice given exclusively by publication in one general notice, describing the property as the same is described on the tax rolls.

"Said certificates of delinquency issued to the county may be issued in one general certificate in book form including all property, and the proceedings to foreclose the lien against said property may be brought in one action and all persons interested in any of the property involved in said proceedings may be made co-defendants in said action, and if unknown may be therein named as unknown owners, and the publication of such notice shall be sufficient service thereof on all persons interested in the property described therein. The names of the person or persons appearing on the treasurer's rolls as the owner or owners of said property for the purpose of this act shall be considered and treated as the owner or owners of said property, and if upon said treasurer's rolls it appears that the owner or owners of said property are unknown, then said property shall be proceeded against, as belonging to an unknown owner or owners as the case may be, and all persons owning or claiming to own, or having or claiming to have an interest therein, are hereby required to take notice of said pro-

ceedings and of any and all steps thereunder."

"Section 1756. The court shall examine each application for judgment foreclosing tax lien, and if defense (specifying in writing the particular cause of objection) be offered by any person interested in any of said lands or lots to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner, without other pleading, and shall pronounce judgment as the right of the case may be. * * * * *

"The court shall give judgment for such taxes, assessments, penalties, interest and cost as shall appear to be due upon the several lots or tracts decribed in said notice of application for judgment or complaint, and such judgment shall be a several judgment against each tract. * * * * *

"The person at such sale offering to pay the amount due on each tract or lot for the least quantity thereof shall be the purchaser of such quantity which shall be taken from the east side of such tract or lot, and the remainder thereof shall be discharged from the lien. * * * * * The County Treasurer shall execute to the purchaser of any piece of land a tax deed. The deed so made by the County Treasurer, under the official seal of his office shall be recorded in the same manner as other conveyances of real estate, and shall vest in the grantee, his heirs and assigns, the title to the property therein described without fur-

ther acknowledgement or evidence of such conveyance."

"Section 5500. Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the Superior Court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title."

"Section 5678. Hereafter no action or proceeding shall be commenced or instituted in any court of this state to enjoin the sale of any property for taxes, or to enjoin the collection of any taxes, or for the recovery of any property sold for taxes, unless the person or corporation desiring to commence or institute such action or proceeding shall first pay, or cause to be paid, or shall tender to the officer entitled under the law to receive the same, all taxes, penalties, interest, and costs, justly due and unpaid from such person or corporation on the property sought to be sold or recovered."

ASSIGNMENT OF ERRORS.

1. The court erred in holding that the tax summons or notice, the tax judgment and the tax deed based thereon were sufficient and valid to divest the title of said plaintiff in error, Ontario Land Company.

2. The court erred in holding that the tax summons or notice, the tax judgment and the tax deed based thereon were not repugnant to the Fourteenth Amendment of the Constitution of the United States, and especially that part thereof which provides that "no state shall deprive any person of his property without due process of law."

3. The court erred in holding that the description of the land in the tax proceedings, and especially in the tax notice and summons, was sufficient to constitute notice under the provisions of the Fourteenth Amendment above mentioned, and was not repugnant thereto.

4. The court erred in holding that the tax judgment and tax deed based thereon did not deprive plaintiff in error of its property "without due

process of law," in violation of said Fourteenth Amendment.

5. The court erred in its conclusion of law that the description of the property sought to be taken for the tax "is a sufficient description to identify the property and support assessment, levy foreclosure and tax deed" within the requirement of the Fourteenth Amendment.

6. The court erred in holding that the plaintiff in error could not attack the validity of the foreclosure proceedings because it had not tendered the delinquent taxes as required by Section 5678 of the Ballinger Code.

7. The court erred in reversing the judgment of the Superior Court.

8. The court erred in remanding the cause with instructions to enter a decree quieting the title of the appellants.

9. The court erred in denying or refusing to hear the motion of the plaintiff in error to modify its order of reversal.

10. The court erred in this, that by its judgment of reversal with instructions to enter decree quieting title of the defendant in error it has denied this plaintiff in error a hearing on the queston of the validity of the tax foreclosure proceed-

ings, the validity of which according to court's holding, was not at issue and could not be at issue because of failure of plaintiff to tender the delinquent taxes, before bringing the action to recover said property.

11. The court erred in its judgment quieting title of the defendant in error, since the effect of its judgment in so doing, is to deprive the plaintiff in error of its property without a hearing as to the validity of said tax title, and in violation of the "due process of law" clause of the Federal Constitution.

12. The court erred in upholding the tax judgment and tax deed for the following reasons:

(a) To give the effect as given by the court to the tax proceedings, tax judgment and tax deed of divesting the title of the respondent, is to deprive the plaintiff in error of its property, without "due process of law," in violation of Article Fourteen of the Federal Constitution, and especially of that part of said Article which provides that "no state shall deprive any person of his property without due process of law."

(b) Because, in order to constitute proper notice under said Fourteenth Amendment in tax proceedings *in rem*, the description of the property

sought to be sold for taxes, must be so full and clear as to disclose to persons of ordinary intelligence what property is intended to be taken, whereas, the description of the property sought to be taken by the tax proceedings here is wholly unintelligible and void on its face.

(c) Because, to give effect to the judgment of reversal of the Supreme Court of the State of Washington is to uphold the tax judgment and tax deed and vest the title in the defendant in error without giving a hearing or a day in court to the plaintiff on the question of the validity of the tax judgment, irrespective of the sufficiency of the description of the land sought to be taken, and therefore, in violation of the "due process of law" clause aforesaid.

13. The court erred in denying plaintiff's petition for re-argument upon the fifth ground therein contained, to-wit: That to give effect to the Tax Summons, Judgment and Deed as given by the Court, is to deprive the respondent of its property without due process of law for the reasons stated in said 5th ground for rehearing; and said court erred in denying said petition for rehearing especially for the reasons stated in said 5th ground for re-hearing.

BRIEF FOR PLAINTIFF IN ERROR.

FIRST.

These lands were not described in the tax proceedings.

It has been so held, by the United States Circuit Court for the Eastern District of Washington (Hanford, J.), in a case involving the same tax sale of the other half of this same unplatted tract; the cases being identical in all respects, except as to the numbers which the assessor had sought to affix to the particular blocks.

> Ontario Land Co. vs. Wilfong, 162 Fed., 999.

The facts relative to this matter of description are exactly set forth in the statement of the case. They present the simple question whether the words "Blocks 352 and 372 of the Capitol Addition to North Yakima," can be said to describe, for the purpose of a tax sale, property which, at

the time, had never been platted or divided or supposed to be platted or divided into blocks, and which had never borne either upon any plat, or upon any public record, or by the authority of the the owner, or by any sort of lay or official usage, either the numbers 352, 372, or any other numbers. Can a tax officer describe the different portions of a large, entire tract, by merely subdividing it in his mind, and affixing to the different imaginary parts such numbers as for any reason he regards as appropriate, without even condescending to make any record which might enable others to follow the flights of his imagination?

As for the implications alleged to arise from the plat's scheme of consecutive numbering, the utmost that can be claimed for them is, that they make it appear probable that *if* the "Reserved" tract had been originally subdivided into blocks, and numbered, the numbers 352 and 372 would have been employed. How can this be material when the land was in fact neither sub-divided nor numbered? Nor does it signify that by careful study of the numbers on the plat, one might feel justified in making an ingenious conjecture as to the theory upon which the description was probably framed. What assurance could there be of the accuracy of the guess? How could a purchaser be certain whether these fictitious numbers in

the tax proceedings were purposely affixed by the tax officers to previously unnumbered tracts, or whether, as would seem much more likely, they had been used by mistake for other numbers such as 242 or 273? Suppose that it should be made to appear that while the tax officer felt justified in affixing the missing numbers to parts of the lands marked "Reserved," he did not feel bound to affix them consecutively or to blocks of the same size as those platted, and so in fact had not applied the numbers as ingenious conjecture might have led one to suppose that he would. Whose numbering would prevail; the conjectural or the official? What assurance could the tax sale purchaser or his remote grantee have, that the tax officer had applie the numbers consecutively, or that the blocks int which in his imagination, he had seen the "Reserved" tract sub-divided, were of the same size as the standard blocks of the addition? What assurance, even now has the court, upon those subjects since the proofs are silent respecting them?

The state court as shown by its opinion, was enabled to support this alleged description only through the two assumptions, about equally unreasonable, that these numbers would have sufficiently identified the property in a private deed or contract, and that their sufficiency in a tax proceeding is determinable by the same rules as in or-

dinary conveyancing. The former assumption does not call for discussion, since it is not material here unless the latter is sound, which manifestly it is not. In a tax proceeding the description of the lands has the double function of notifying the owner and the public, *i. e.*, all possible purchasers, existing encumbrances, creditors, *etc.*, exactly what lands are sought to be charged. Descriptive words in a conveyance, when read in the light of circumstances surrounding the parties and their transaction, may often sufficiently identify a tract as the one in fact mutually intended, (which is all that is necessary in such a case) though the same words would not adequately identify the land for the purpose of legal notice to third parties or even to the parties themselves apart from the circumstances of their particular negotiation. The former is a question determinable by the law governing the ascertainment of conventional intent; the latter by the law of notice.

Moreover in those jurisdictions where the integrity of the law as a moral rather than a drastically logical science is upheld, the standard of certainty enforced by the law of notice becomes more exacting as the hazzards of oppression increase, so that in a tax proceeding which aims at the divestment of title *in invitum* in the exercise of a naked statutory power, upon constructive notice, and

through the foreclosure of a lien which is always for a mere fraction of a tithe of the property value, amounting, as it habitually does, practically to a species of forfeiture, a high degree of accuracy and certainty are exacted. Of such a proceeding this Court has said:

> "The Court recognizes the correctness of the principle contended for by counsel for the plaintiff in error, that in an *ex parte* proceeding of this kind, under a special authority great strictness is required. To divest an individual of his property, against his consent, every substantial requisite of the law must be shown to have been complied with." * * * "It is not sufficient that such a description should be given in the advertisement as would enable the person desirous of purchasing to ascertain the situation of the property by enquiry."
>
> *Rokendorff vs. Taylor* 4 Pet. 349, 359, 362.

In that case it was therefore held in harmony with the authorities everywhere, that in a tax proceeding, the description of land as the half of a certain lot assessed to one Taylor, was void for uncertainty, and could not be applied to the *undivided* one half which Taylor owned.

In a voluntary conveyance it would on the contrary, undoubtedly have been assumed that Taylor's half being undivided, it was that which he intended to convey.

Baldwin vs. Winslow 2 Minn. 213.

So, the description which in *Bird vs. Benlisa*, 142 U. S. 664, 670, was held inadequate in a tax proceeding would, in view of the facts recited on page 668, undoubtedly have been held good in a voluntary conveyance.

To the same effect is *Stout vs. Mastin*, 139, U S., 151-152.

In *Tallman vs. White*, 2 N. Y. 66, where this distinction was involved, the Court said:

> "In a deed between individuals, a part of the description of the premises conveyed may be rejected on account of its falsity, if after its rejection there is enough left to show clearly what the owner intended to convey. In this case, if the owner of the land had executed the deed, giving the boundaries correctly, the title might have passed, although the land was falsely described as to the village in which it lay. It would then present the question

what the owner intended to convey. There is no such question here. The owner conveys nothing, and does not intend to convey anything. If the officers who undertake to convey for him, intend to convey land lying in one place, by a deed describing them as lying in a different place, they intend to do what the statute, under which they profess to act, does not permit. A judicial decision which should sanction a title like the present, would open a door to innumerable frauds."

To same effect is *Hill vs. Mowry*, 6 Gray, 551. (Cited approvingly in *Stout vs. Mastin, supra.*)

So, in *Zink vs. McManus et al.*, 121 N. Y., 259, the Court said:

"It would be difficult, even in a conveyance between individuals, to hold that the description contained in the Comptroller's deed embraces or sufficiently identifies the land described in the complaint. In proceedings *in invitum*, where public officers undertake to convey, under statutory power, the property of individuals, such a description is fatally defective."

So, in *Miller vs. Williams*, 135 Cal., 183, 185, where it is said:

"A description which would suffice in an agreement to convey, or in a deed, may be bad in an assessment. In the first case the Court might enquire as to the intention of the parties, but in the other, the owner has no part in the proceeding, which is hostile, and to every step in which he is objecting. The assessment is made with a view to a possible sale, and the property should be therefore so described as to enable the owner to know what land is charged with the tax, and also to enable a possible purchaser to know what land is offered for sale."

So, in *Wofford et al vs. McKinna,* 23 Texas, 36, where the general principles applicable to the subject are discussed as follows:

"From its terms it is uncertain in what form the lands are to be taken. Neither the owner of the land, the party in possession, nor the Court, can know from the face of the deed, what are the boundaries of the claim. The deed is manifestly void for uncertainty in the description of the premises, unless it can be aided by matters extrinsic of itself. If it were a contract or conveyance between individuals, this unquestionably might be done, and effect given to the contract or conveyance. In a contract between individuals, if a latent ambiguity exists in the description of the land, parol evidence is resorted to for the purpose

of explaining it, and giving effect to the intention of the parties; and where the estate intended to be conveyed is sufficiently described in the instrument, the addition of a circumstance, false or mistaken, will be rejected as surplusage in order to carry the intention into effect. But the law in respect to the class of titles to which the present belongs, is settled otherwise by the whole current of decisions, both in the federal and state courts. Blackwell on Tax Titles, 450, 451, et seq., and numerous cases cited in the text. 'A description sufficiently certain to convey land between man and man, and which, if contained in an agreement to convey, would authorize a court of equity to decree a specific performance, will not answer in the proceedings to enforce the collection of a tax.' Blackwell, 124. A grant by the owner of a certain number of acres in a particular tract, would confer a right of election upon the grantee, and authorize him to locate the quantity in any part of the tract he saw proper to elect, upon the principle that a conveyance must be held to pass some interest, if such effect may be given to it, consistently with the rules of the law, and that, if uncertain or ambiguous, it must be construed most strongly against the grantor. But in this respect, it is said, there is a wide difference between the conveyance of the owner and a public officer. The former may sell upon his own terms, and may confer a right of election upon his grantee. But power to grant such right is not conferred upon the officer

of the law. He is the mere instrument to pass the title. He acts under a special and limited authority, conferred by the law, and not by the owner of the estate. In this proceeding the owner 'has nothing to do—he intends nothing; the government is acting through its agents in hostility to him.' The proceeding is construed strictly; and parol evidence is not admitted to explain a latent ambiguity in the description, or to locate the land. If the description by the officer be not so certain and complete as not to require the aid of extrinsic evidence, his deed is held to be void. Blackwell, 156; 2 Ham. 287; Ewing vs. Helm, 13 Serg. & R. 151; 13 How. 23."

In *Curtis vs. The Board of Supervisors of Brown County*, 22 Wis., 167, where the ambiguity was one that could be easily reconciled by construction of the plat, the court said:

"The counsel for the plaintiff are fully sustained by authority and correct in the position, that a false or mistaken description of the land, in proceedings to enforce the collection of taxes, avoids the sale, certificate or deed. The reasons are obvious. The officers are engaged in the exercise of mere, naked statutory powers, which must be strictly pursued, and the execution of which can only be shown by the *acts* of the officers themselves, evidenced

in the manner prescribed by the statute. The certificate is the sole evidence of the land sold, and the deed, of that conveyed; and hence parol evidence cannot be received to aid or correct a description which is false or mistaken. For the same reason also, no part of the description can be rejected as surplusage, nor words omitted be supplied, as in similar transactions between private individuals. The officers can be presumed to have no intention different from that expressed by their acts. To receive evidence that they intended another description in the place of the one given, or that they sold or conveyed lands lying in one place for those which lie in another, or which have no existence at all, would be to show that they intended to do that which the law under which they proposed to act did not permit, and which was therefore illegal. Another reason why the description in the list, certificate or deed must be adhered to for the purpose of testing the legal validity of the proceedings, is that otherwise the owner of the lands would lose all benefit of the notices required by law to be given in such cases. It would be impossible for him to know, either from the published lists of the assessment roll, that this land had been assessed or sold, or was to be sold or conveyed; and hence he cannot be considered delinquent in not having paid the taxes, so that his title to the land should be lost or forfeited."

The inadmissibility of recourse to argumentative processes or to ingenious inferences in order to decipher an alleged description in a tax proceeding, is further illustrated by several decisions in Minnesota, which is one of the few states whose taxes like those of Washington are collected through a judicial proceeding *in rem.*

Thus in *Knight vs. Alexander,* 38 Minn., 384, 387.

The delinquent list as published described land as N½ NE¼ SE¼ NE¼ NE¼ of NW¼ of Section 23. Township 114 Range 30, and as containing 160 acres. In support of the description it was contended that it meant N½ of NE¼, SE¼ of NE¼, and NE¼ of NW¼ of Sec. 23 etc., and that this meaning was demonstrated as a matter of easy interpretation, by the fact that this reading and no other would produce a tract answering the call for 160 acres. The Court, holding the description bad, said:

> "We are of the opinion that under the strict rule which is always applied in such cases, this consideration does not justify holding this description, which is in fact erroneous, to be a sufficient designation of the land in

question for the purposes contemplated in the publication of the delinquent list. The principal object for which that publication is required, is to give notice to those persons interested in the land, and whose attention may be in no other way drawn to the facts involved in the notice. Hence, while a particular description which the parties to a deed of conveyance may have adopted to designate the land intended by them to be conveyed may be sufficient, although in some respects erroneous, it does not follow that such a description in a published tax list would be legally sufficient as constructive notice."

So, in *Keith vs. Hayden*, 26 Minn. 212, the description in the tax judgment was S^2 NE^4 and NW^4 SE^4 of Section 32 Township 40 Range 26 containing 120 acres. It was found by the trial court, that according to a local usage in that part of the state this meant S½ of NE¼ and NW¼ of SE¼ of Sec. 30. This also was the only interpretation that would produce a 120 acre tract as called for. Yet the description was held insufficient, the Court refusing to exercise its ingenuity in deciphering how much the tax officers had intended which they had not expressed, and pointing out that a real estate tax judgment, describing no land, lacks a subject and adjudges nothing.

Williams vs. Central Land Co., 32 Minn., 440, bears strong points of resemblance to the case at bar. There, the Auditor had been expressly authorized by Statute to make and file plats describing, subdividing and numbering irregular tracts of land, by reference to which plats and numbers, said lands might be described for purposes of taxation. The ownership of a certain quarter section of land having been broken up into irregular tracts, the Auditor caused a survey to be made of it by the County Surveyor and duly filed a plat of the survey. But instead of marking the tract in controversy on the plat as lot No. 2, it was merely stated in the certificate to the plat that the tract conveyed by Timohy Heald to Frederick Williams, (which was the tract in controversy) is called lot No. 2.

There was thus no difficulty whatever in inferring from data disclosed by public records, that the tax officers *meant* to describe the lands in controversy as lot No. 2. Yet because the number had never been attached to the lot by the owner, and because the Auditor in attempting to affix the number to the lot had not conformed to his statutory authority by affixing the number to the lot upon the face of his plat, it was held that the tract in question had never become lot No. 2 and so was not well described as such.

To appreciate how much further the case goes

than necessary to our position, it must be borne in mind, that in our case the tax officers had no authority whatever to subdivide or number unplatted tracts, and that they made no plat or other record of their subdivision or numbering, so that it is impossible to do more than conjecture that they even *meant* to attach any numbers to the different parts of our entire, undivided, and unnumbered "Reserved" tract.

Black's general statement of the certainty requisite in tax proceedings, as given in Sec. 208 of his work on *Tax Titles*, is as follows:

> "One of the most important requisites in this notice of advertisement is, it should contain an adequate and accurate description of the lands to be sold. If this is omitted, or if the description given is insufficient and imperfect, the notice is fatally defective and the tax sale void. * * * And it is said by a high authority: 'It is not sufficient that such a description should be given in advertisement as would enable the person desirous of purchasing to ascertain the situation of the property by inquiry. Nor, if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, yet the sale would be void, unless the same information had been communicated to the pub-

lic in the notice. Its defects, if any, exist in the description of the property to be sold, which cannot be cured by any communications to bidders on the day of the sale by the auctioneer.' But surely these last views do not go far enough. To inform intending purchasers is indeed one of the reasons for requiring a description in the notice, but it is not the only one. Another reason is, to call the attention of the owner to the jeopardy to which his interests are exposed. Nor is the owner alone concerned in the sufficiency of the notice, but it may be even more important to mortgagees, or others, whose interests or liens might be divested by a tax sale of the property. It is certainly one of the functions of the advertisement to advise such persons that the property in which they are interested is going to sale for taxes. And it is very possible that this might not be accomplished by a notice which would very well serve its purpose with respect to the owner and to intending purchasers. Therefore, the plain necessity of the case seems to demand a more stringent rule, in this regard, than that which would be satisfied with a description which was merely not calculated to mislead the owner."

To the same effect is 2 *Cooley on Taxation* (3d Ed.) p. 935.

To the same effect are the following cases:

Schattler vs. Cassinelli, 56 Ark., 172.
Jones vs. Pelham, 84 Ala., 208.
People vs. Mahoney, 55 Cal., 286.
Greene vs. Lunt, 58 Me., 518, 534.
Bidwell vs. Webb, 10 Minn., 59.
Jackson vs. Sloman, 117 Mich., 126.
Clemens vs. Rannells, 34 Mo., 583.
Wooters vs. Arledge, 54 Tex., 395.
Jackson vs. Delaney, 13 Johns., 552.
Mitchell vs. Ireland, 54 Tex., 301.
Kleber Void Sales, Sec. 354, and cases cited.

SECOND.

The lack of description is not cured by the owner's personal knowledge of the tax, whether accidentally derived, or otherwise.

As already noticed, the Washington tax proceeding is purely *in rem*.

Williams v. Pittock, 35 Wash., 271.
Woodward v. Taylor, 33 Wash., 1.
Spokane v. Abitz, 80 Pac., 192.

Carson v. Titlow, 80 Pac., 299.
Allen v. Peterson, 80 Pac., 849.
Dolan v. Jones, 79 Pac., 640.
Rowland v. Eskland, 82 Pac., 599.

It is the description in the tax proceeding which constitutes the constructive seizure upon which the proceeding depends for its validity. To argue that personal knowledge of the tax, dispenses with the necessity for a description of the taxed property in the tax proceedings, is like arguing that in Admiralty no seizure is necessary if the owner of the vessel happens to learn in some other way that his craft is being libelled. As constructive notice, if regular, is effective whether resulting in actual notice or not, so if not regular it is abortive no matter how much actual knowledge there may be. In other words, in any proceeding resting upon constructive notice, the presence of actual knowledge is as utterly immaterial as its absence would be. In principle, the contention of defendant in error at this point, is even exactly like arguing that in a personal action a defendant who was never summoned or cited, is bound by the judgment because he had otherwise received knowledge that the court was assuming to proceed against him.

Neither person nor property is subjected to the jurisdiction of a court by mere knowledge on the part of the party or owner, that the court is assuming to act. And the question in hand, is, it will be observed, purely a question of jurisdiction.

The attempt to cure the absence of seizure or of other forms of constructive notice prescribed by statute, by showing actual knowledge, is like the attempt to support, against constitutional objections, a proceeding for which no notice is prescribed by statute, by showing that notice was nevertheless actually given. In both cases the proposition is to support jurisdiction by showing *extra legal* knowledge or notice, the only difference being that the constructive notice for which actual knowledge is offered as a substitute, is in the one case prescribed by statute, in the other by the constitution. In neither case can this be done.

Security Trust Co vs Lexington, 203 US 323-339

"It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them and give them a right to a hearing and an opportunity to be heard."

Stuart vs. Palmer, 74 N. Y., 188, 195.
The R. R. Tax cases, 13 Fed. 722, 753.
Roller v. Holly 176 U. S. 398-409.

So in *Roukendorff vs. Taylor*, 4 Pet. 349, 362, where there was a failure so to describe the property taxed as to acquaint purchasers with it, the Court said:

> "Nor, if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, yet the sale would be void, unless the same information had been communicated to the public through the notice. Its defects if any exist in the description of the property to be sold, cannot be cured by any communication made to bidders on the day of sale by the auctioneer."

THIRD.

The tax proceedings not having described our property, were not, as against it, "due process of law."

It was so held in Ontario Land Co. vs. Wilfong 162 Fed. 999.

A description was indispensable:

(a) As an element in the constructive seizure and notice upon which respondent's tax judgment *in rem* depends for its validity.

(b) As an element in that opportunity to be heard, however attenuated it may be, upon which the validity of even an executive tax proceeding always confessedly depends.

(c) As a safeguard against the repeated collection of the same tax.

(A) By reference to the Washington tax law, all the material sections of which are hereinbefore quoted, it will be seen that the county treasurer, at any time after the tax upon land shall have been delinquent for six months, is required to issue a certificate of such delinquency to any one offering to pay the taxes and interest. (See 1749 Bal. Code.)

The purchaser of such certificate, at any time after three years from the date of delinquency, may give notice to the owner of the property that he will apply to the Superior Court of the county, for a judgment foreclosing the tax lien, which notice shall contain *inter alia*, a description of the property, and the name of the owner thereof, if known,

and a direction to the owner to appear within sixty days and defend the action, etc.

Bal. Code, Secs. 1751, 1751½.

So the county, may foreclose the certificate if it remains unassigned in its hands for five years.

Bal. Code, Sec. 1751b.

The forecloseure, in either case, is strict and absolute, without right of redemption. (Sec. 1756.)

The foreclosure here involved was by the County, and the notice by publication only, as provided by Sec. 1751b.

(Fol. 13 of Record.)

The description relied upon by respondents, was throughout the tax proceeding accredited to owners "unknown," the name of the owner of the lands here in dispute nowhere appearing in connection therewith, either in the tax roll or in the foreclosure proceeding.

(Fols. 91, 94, 97 of Record.)

The county's published notice of application for judgment of foreclosure, is the only notice, constructive or otherwise, to owners, for which provision is made in such cases, from the initial assessment down to the final judgment.

As already noticed, and confessedly, as we suppose, the judgment of foreclosure is a judgment strictly *in rem*, and is so ranked by the Washington court.

Williams vs. Pittock, 35 Wash. 271.
Carson vs. Titlow, 38 Wash. 196.
Spokane vs. Abitz, 38 Wash. 8.
Allen vs. Peterson, 38 Wash. 599.
Rowland vs. Eslund, 40 Wash. 253.

Since the name of the owner of these lands nowhere occurred in connection with the tax or foreclosure proceedings—since no summons, notice, or citation was ever served upon such owners—since there was no actual seizure of the lands, and since these lands, were nowhere described in the tax or foreclosure proceedings, what was there about those proceedings so far smacking of either seizure or notice, actual or constructive, as to furnish any constitutional basis for a judgment, whether *in rem* or otherwise? This is surely an unanswerable question, and must be decisive of this con-

troversy, unless the court is prepared to find that there was in fact an adequate description.

If it is argued that the provision for a judgment might, in the discretion of the state legislature, have been entirely omitted, and a purely executive tax procedure substituted, and that we therefore cannot insist as matter of federal right upon the prerequisites to a valid judgment *in rem;* our reply is, that the state cannot at the same time provide for such a judgment and dispense with its constitutional prerequisites. A state may if it will, provide for a tax not resting upon a basis of appraised valuation, and then no opportunity to be heard can be claimed under the federal constitution. But if the state elects to apportion its taxes upon appraised valuation, the federal guaranty of a right to be heard must then be respected.

Hager vs. Reclamation Dist. 111 U. S. 701, 709.

Whether there is a federal right to be heard in a tax proceeding may thus depend upon the kind of tax and proceeding the state elects to provide for. Parity of reasoning would seem to require that where a state elects to make the enforcement of a tax conditional upon a judicial finding and determination, having all the binding qualities, as well

as the name of a judgment, the proceeding cannot be held to comport with the fourteenth amendment, unless the judgment has been obtained upon such notice, or actual or constructive seizure, as that amendment calls for in the case of other judgments of the same general class. In other words, a state legislature cannot in a tax proceeding, any more than under other circumstances, impart to a proceeding in court, all the conclusive effects of a judgment, without conforming the proceeding to the constitutional pre-requisites of judgments generally of its class.

There can of course be no valid judgment *in rem* without either an actual seizure, or some notice-conveying act which the law can treat as a constructive seizure, of the *res*.

Windsor vs. McVeigh, 93 U. S. 274.
Leigh vs. Greene, 193 U. S. 79.
Longyear vs. Toolon, 209 U. S. 414.
Wolfe vs. Denver, 28 Sup. Ct. Rep. 708.

(B) In principle it seems equally clear that independently of the fact that a judgment is a condition precedent to a Washington tax sale, and though the prescribed tax proceeding were purely executive, the failure to embody in it an informing

and trustworthy description of the lands taxed, would preclude its classification as due process.

That in case of a tax, based as this is, upon the value of the property assessed, it is a condition of its validity under the fourteenth amendment, that the owner shall have an opportunity to be heard, is now settled law.

> Security etc. Co. vs. The City of Lexington, 203 U. S. 323.
> Central Ry. of Ga. vs. Wright (decided Nov. 18, 1907) 207 U. S. 127.

To local assessments, the same rule was still earlier applied.

> Turpin vs. Lemon, 187 U. S. 57, 58.

With this settled right, the idea of divesting the title to land, by a tax proceeding in which the land is not described, is utterly at war. However much the standards of notice requisite in a judicial proceeding may be relaxed in an executive tax proceeding, the fact remains, that an opportunity to be heard, even in the mildest possible meaning of the words, cannot be predicated with respect to any proceeding for the enforcement of an *ad valorem*

tax against property whose identity is not reliably disclosed by public records.

What more effective expedient could be devised for enforcing a tax without opportunity to be heard, than the doctrine that a tax proceeding can divest the title to *land* which it has not dezcribed? To say on the one hand that property can be taken for an *ad valorem* tax levied upon and enforced against it without describing it, and to say on the other, that title cannot be divested for an *ad valorem* tax without an opportunity to be heard, is a flat contradiction; since in the former case all opportunity for hearing is cut off, by the keeping of the party entitled to it, in ignorance of the fact that any occasion or necessity for a hearing has arisen.

(C) There is a slightly different point of view, from which the subject may be regarded with necessarily the like result. An alleged taxation of property without a reliable description of it, falls short of due process, not only because notice and opportunity to be heard are wanting, but because under such circumstances the same property actually aimed at by the assessor, is liable to be subsequently retaxed as *omitted* property. Provisions for the taxation of omitted properties are found

everywhere, or may be enacted at any time in any community, (if there be such) where not now in force. The only security against a repetition of the same tax for the same year upon the same property, over and over again, upon the pretense of its omission from former tax rolls, is a reliable description of the property in the tax rolls and proceedings. And surely upon the same principle upon which the Fourteenth Amendment is held to require an opportunity to be heard with reference to the *amount* of an *ad valorem* tax, it must require safety against duplications or *indefinite repetitions* of *that amount*. The tax proceedings must so identify the property aimed at, as to show that it is taxed property and not omitted property.

The Fourteenth Amendment is confessedly applicable alike to all departments of state government, and to other forms of gross injustice quite as much as to the absence of notice or opportunity to be heard in a judicial or a tax proceeding.

Chicago B. & Q. R. R. Co. vs. Chicago,
166 U. S., 226, 234.

It is a question merely, as to when the injustice becomes palpable enough and gross enough to be incompatible with any reasonable conception of due process.

It is no doubt true, as in substance has been frequently said by this court, that a tax proceeding is not necessarily obnoxious to the Fourteenth Amendment because some of its features seem to the court unequal or unjust. Allowances must be made for the wide discrepancies of judgment, and for the marked diversities of tradition, custom and notions of public policy, current in the different states, and under varying conditions. But there are always residuary forms of injustice too grossly impinging on fundamental rights to be advisedly tolerated anywhere, which it was the aim of the "due process" clause to preclude. Thus as was said by Mr. Justice Bradley in *Davidson vs. New Orleans*, 96 U. S. 97, 107, and quoted approvingly in *Hagar vs. Reclamation District*, 111 U. S. 701, 708:

> "In juding what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power of eminent domain, or the power of assessment for local improvements, or some of these, and if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, *but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'* In the case last cited, it is further said: 'By due process is meant one which, following the forms of law,

is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; *it must be adapted to the end to be attained.'* * * * The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those *general rules established in our system of jurisprudence for the security of private rights.*"

And see Scott vs. McNeal, 154 U. S., 34, 45, 46.

(Here and elsewhere throughout the brief the italics are our own.)

Now the collection of a tax claimed to have been aimed at land which is not so identified as to preclude its subsequent treatment as omitted property, is surely well described as "arbitrary, oppressive and unjust;" as a proceeding not "appropriate to the case;" as not "adapted to the end to be attained;" and as not in observance of those general rules established in our system of jurisprudence for the security of private rights." For in our systems of taxation nothing is more fundamental than the adjustments that enable us to distinguish between those properties upon which the taxes have been and those upon which they have not been, paid.

FOURTH.

The state judgment in this case, was wanting in due process, in that

(1) *It awarded to Defendants, affirmative relief upon a distinct cause of action which had not been pleaded, and to which therefore the jurisdiction of the court did not extend.*

(2) *It assumes to supplant our title by force of a tax judgment and sale upon whose validity we were denied a hearing.*

(1) The pleading of defendants was purely defensive; no counterclaim was set up, no affirmative relief was sought, dismissal only was prayed. (Fols. 0-17.) In no sense was the right of defendants to affirmative relief, in litigation or before the court. Yet in its final judgment, the Supreme Court of the state by a purely voluntary, arbitrary and extra-judicial exercise of power, assumed to quiet defendant's title as against the ad-

verse claim of plaintiff. Had defendants sought such relief it must under the Washington code, have been by way of counterclaim, or a pleading of a distinct cause of action upon which an action could have been brought by defendants against plaintiff. The material provisions of Ballinger's

Washington Code are as follows:

Section 4912:

"The answer of the defendant must contain—(1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. (2) A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition."

Section 4913:

"The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action."

The plaintiff's action being in ejectment, "the subject of the action," was the land, with which subject, the defendant's cause of action if any, to quiet their title, was "connected."

Cornelius vs. Kessell, 58 Wis., 237.

That this was true under the law of Washington is shown by the decision in *First National Bank vs. Parker*, 28 Wash., 234, where in a suit to foreclose a mortgage, the realty was held to be the subject of the action so as to permit defendant to counterclaim for damages for wrongful interference with the possession. The court adopted the principle of Metropolitan T. Co. vs. Tonawanda Co., 43 Hun., 521, where in a suit to foreclose a mortgage the subject of the action was held to be the mortgage and the land, so that a defendant senior mortgagee could counterclaim for foreclosure of his own mortgage; which is quite in harmony also with the authorities generally in New York and most of the code states.

Carpenter vs. Manhatten Life Ins. Co. 93 N. Y. 552.
Thompson vs. Kessell. 30 N. Y. 383.
Glen Co. vs. Hall. 61 N. Y. 226.

That the right of a defendant to affirmative relief, is not presented for the consideration of a court, by a merely defensive pleading which embraces neither a counterclaim *eo nomine*, nor a prayer for affirmative relief, is a proposition upon which the concensus is complete. The authorities upon the subject are conveniently grouped in 19 *Ency. Pl. & Pr.*, 745-747.

The basis of the rule is broader and deeper than in most of the state decisions it has been necessary to point out. It is identical with the doctrine of *Windsor vs. McVeigh*, 93 U. S., 274, 280, 282, where it is pointed out, that the same constitutional principle that requires the citation of a defendant, demands that the parties be advised by appropriate pleadings of the claims made against them, and forbids that in a litigation framed for the trial of one issue, another should be extrajudicially determined. In the latter case as truly as in the other, that opportunity to be heard, which is of the essence of due process is wanting.

This principle of *Windsor vs. McVeigh*, was reapplied in *Hovey vs. Elliott*, 167 U. S., 409, 414, and has been widely enforced in the state decisions.

An admirably reasoned case is *Munday vs.*

Vail, 34 N. J. Law, 418, 422, where it is well said that all the estoppels of a judgment spring from the supposition that the defeated party has had a day in court and an opportunity to be heard, which is grossly false as to any matter not included in the issues.

For example is it not obvious that if upon the trial of the case at bar we had ventured to submit to the court any considerations, *whether of law* or fact, bearing upon the right of defendants to affirmative relief, they must have been ruled out as irrelevant to the issues.

So, in *Dunlap vs. Southerlin*, 63 Texas 38, 42, where it is said:

> "Courts have no more power, until their action is called into exercise by some kind of pleading, to render a judgment in favor of any person, than they have to render a judgment against a person until he has been brought within the jurisdiction of the court in some method recognized by the law as sufficient."

So, in *Elsey vs. Falconer*, 56 Ark., 419, 422, a tax judgment for several years taxes, only a part of which were included in the complaint, was held void for want of jurisdiction.

The power to hear and determine an issue cannot be said to exist, until the issue has been presented by appropriate pleadings.

Spoors vs. Coen, 44 Ohio St., 497, 503.

> "It is an elementary principle that the courts can only act upon such matters as are properly brought before them by the parties, according to the settled law, practice and usage. Windsor vs. McVeigh, 93 U. S., 282. * * * * * And this court has repeatedly held that it has no more power than an inferior court to pronounce a decree binding upon the parties upon matters which are not brought before it in the regular mode of adjudication, but are entirely outside of the cause."
>
> Randolph vs. Merchants Bank, 9 Lea, 68.

This is the principle of those cases also, which hold a judgment void for want of jurisdiction, as against a defendant not appearing, when based upon an amendment to the complaint in a suit dependent upon an attachment.

Stewart vs. Anderson, 70 Tex., 588, 600.
Willis vs. Cooker, 1 Pick., 204.

Fairfield vs. Baldwin, 12 Pick., 388.
Page vs. Jewett, 46 N. H., 441.
Tilton vs. Cofield, 2 Col., 392.

(2) The plaintiff's action was brought in the full assurance that its land had not been described in the tax proceedings; that therefore, no taxes had been levied upon it, nor any tax sale of it made; that it was held by the defendants merely upon an unfounded claim or pretense of a tax sale; that Section 5678 of Ballinger's Codes relative to tender or payment of taxes justly due and unpaid, had therefore, no possible application to the case, but that the land stood in the position of omitted property upon which the taxes for the years of omission might be at any time in the future, assessed.

When the Supreme Court of the state held the alleged descriptions good, the land was brought within the operation of the statute requiring tender. The court should then, in accordance with defendants only prayer for relief, (Fol. 17) have directed the dismissal of the action. We could then have made our tender, and have commenced another action to test the validity of the tax sale. The well considered case of Lombard vs. McMillan, 95 Wis. 627, 634, is directly in point, that under such

a statute the failure to make tender is matter in abatement only. To the same effect is Hendy vs. Soule, Deady, 400. The distinction between a dilatory plea and one in bar is fundamental, and of course as real as ever, even in the code states that have abolished the distinctions in the forms of the two pleas and provided for their union in a single answer.

Pom. Rem., Secs. 697, 698.
1 Encyc. Pl. & Pr., 2.

When the descriptions were held good, it was into the category of actions prematurely commenced that our action fell. Having been brought without tender, it was like an action brought without making a pre-requisite demand, (*Gray vs. Dougherty*, 25 Cal., 266, 273-4) or without giving a pre-requisite notice, (New England Bank vs. Lewis, 8 Pick., 113, 118, Rose vs. City of Yonkers, 133 N. Y., 315), or on a warranty, before eviction, (Hurst vs. Means, 2 Sneed, (Tenn., 546), or on a debt, before maturity, (Bull vs. Hopkins, 7 Johns., 22, Krapp vs. Eldridge, 33 Kans., 106, Hardin vs. Dickey, 123 Cal., 513), or in equity, before a pre-requisite verdict at law had been obtained, (Maxwell vs. Clarke, 139 Mass., 112), or against a guar-

antor, before exhaustion of remedy against principal, (Boyer vs. Austin, 54 Ia., 402), or on a bail bond, before the plaintiff surety has himself made payment, (Maloney vs. Nelson, 158 N. Y., 351, 353) or on a bond, before its conditions have been fulfilled, (McFarlane vs. Cushman, 21 Wis., 406, 409), or for an interest in land, before the occurrence of the death upon which it was to accrue, (White vs. Shell, 84 Mo., 569), or for a local assessment, before a pre-requisite certificate had been filed, (Brackett vs. People, 115 Ill., 29, 32,) or to enforce a mechanics lien, before the statutory period had expired after the completion of the work, (Seaton vs. Hixon, 35 Kans., 663, 665.)

In all such cases the *right of action* which existed when the second suit was brought did not exist at the date of the first, and "no adjudication affects after acquired rights."

Bacon vs. Schepflin, 185 Ill., 130.

But in the case at bar, the Washington Court, if its judgment is to be interpreted literally, completely effaced the distinction between judgments in abatement and those in bar, by adjudging at one and the same time, that for lack of tender the merits of the controversy could not be considered, and that defendants should nevertheless be quiet-

ed in the ownership of the land. (Fol. 109) Now the constitutionally guaranteed "opportunity to be heard," is something extremely illusory, if a plaintiff can still be foreclosed upon the merits of his action without a hearing upon them, and as a mere incident to the support of a dilatory plea. If the judgment at bar is the result of due process, then in a code state, a defendant in an action on a promissory note, praying dismissal only, and without counterclaiming for a decree of cancellation, can evade a trial of the merits by showing the note not yet matured, and then incorporate in his judgment a decree for the cancellation of the note. Between such a judgment and that by which we have been oppressed, what minute difference of principle can be suggested? What is there more fundamental in the law, than the principle that a judgment *in bar*, can supervene only upon an opportunity to be heard upon the merits? The cases of Windsor vs. McVeigh, 93 U. S., 282, and Hovey vs. Elliott, 167 U. S., 409, 414, seem to be decisive that it is immaterial just how or when the opportunity to be heard is cut off. It may be by absence of citation, or by refusal to accept the litigant's proffered appearance, or by refusal to receive his pleadings or proofs, or by striking them out or refusing to consider them after they have been received; all these methods being alike destructive of the "opportuni-

ty," and therefore equally incompatible with due process of law. We adduced proofs of irregularity in the tax proceedings, (unnecessary to be discussed here in detail, see statement of case), which by Judge Hanford sitting in the United States Circuit Court for Washington, have been held to render the tax judgment absolutely void for want of jurisdiction.

Klenk vs. Byrne, 143, Fed., 1008.
Ontario Land Co. vs. Wilfong, 162 Fed. Rep. 999.

The Supreme Court of the state refused to consider these proofs or their bearing upon the validity of the tax judgment, because it found no tender had been made, and yet in the same breath finally adjudged the impeached tax deed a perfect title.

It is not material that this was honestly done by the court in the exercise of its judicial functions, for the same was true in the *McVeigh and Hovey* cases, *supra*, where the resulting judgments were held void.

Our case, in the phase now under consideration, resembles *Warner vs. Godfrey*, 186 U. S., 365, 377, which case, after hearing was reopened to al-

low an amendment to the bill setting up a new and distinct ground of relief, without re-opening the testimony. Defendant was held to have had no opportunity to be heard. This would have been equally true of course, if, as in our case, the court had dispensed with the formality of amendment, and had given judgment upon a cause of action not pleaded at all, but gratuitously introduced by the court itself.

The judgment should be reversed upon the ground that our lands were not described in the tax proceedings or our title divested by due process. If the alleged descriptions are found good, the judgment should be so modified as to provide only for a dismissal of our action.

ARCADIUS L. AGATIN,
Solicitor for Plaintiff in Error.

WM. W. BILLSON, of Counsel.

Office Supreme Court, U. S.
FILED.
APR 10 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted]59.

ONTARIO LAND COMPANY, PLAINTIFF IN ERROR,

vs.

JAY YORDY ET UX.

CERTIFIED COPY OF BRIEF IN SUPPORT OF PETITION FOR REHEARING IN THE SUPREME COURT OF THE STATE OF WASHINGTON, FILED AS APPENDIX TO BRIEF FOR DEFENDANTS IN ERROR.

B. S. GROSSCUP,
Counsel for Defendants in Error.

(20,663.)

IN THE

Supreme Court, State of Washington.

6233.

THE ONTARIO LAND COMPANY, RESPONDENT,

vs.

JAY YORDY ET AL., APPELLANTS.

BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR RE-ARGUMENT.

To facilitate the reading in the perusal of this brief we submit the following index and synopsis of the argument in support of the several points:

(The references to paging is to red ink numbering.)

(References to grounds of rehearing are to petition for rehearing.)

Synopsis of Argument.

FIRST GROUND OF REHEARING.

(Petition, pp. 1 to 3.)

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(Petition, pp. 3 to 4.)	
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2. Act of 1903, Laws 1903.....	6 to 9
3. Remedy by act 1903 exclusive.....	10 to 12
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THIRD GROUND FOR REHEARING.

(Petition, pp. 4 to 5.)

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Invalidity of tax title, irrespective of description..	16 to 22
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1. Sale of land in excess of limit.....	16 and 17
2. Tax judgment void because summons is void..	18 to 20
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FOURTH GROUND FOR REHEARING.

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First Ground of Re-argument.

Nothing need be added in support of the petition for rehearing upon the first ground. The statement therein contained, supplemented by Mr. Congdon's affidavit, sufficiently shows that the results likely to follow from the decision in this case, if adhered to, are real and not imaginary. There can be no doubt that, armed with the decision in this case, the tax title-holder will possess a weapon which the property-owners affected are utterly helpless to dodge. They must come to his terms or lose their property.

Aside from the legal questions involved, which will be fully discussed, to show that the court made a clear mistake of law, we take the liberty under this head to suggest whether from a practical point of view, leaving aside for the moment the legal questions involved, this decision ought to stand. Looking at the matter in this light, is the decision justifiable, considering the gravity of the consequences likely to follow? What are the equities of the case? The parties involved by the decision in this case are:

First. The State of Washington, indirectly, is interested in the collection of its taxes.

The court in its opinion seems to assume that this was a deliberate attempt on the part of the respondent to escape its share of the burdens of taxation. Mr. Congdon's affidavit fully answers that point. But in any event can it be true? Is it possible to escape the taxes which legally should be borne by the "reserved" tract for the years involved in the tax judgment? Certainly not. It is the law of this State that taxes are a perpetual lien, and no statute of limitation applies.

Port Townsend case, 28 Wash., 533.

Such being the law, what is there to prevent the taxing authorities from assessing these back taxes on Heerman's Addition? There can be no doubt that the State can legally

collect the taxes, with interest; hence, the only loss that the State may suffer is that of delay. From the point of view of the State, then, the equities of the State are overbalanced

*(1)

and made insignificant when compared with the results of the decision to the respondent. The decision not only deprives this respondent of its property for a small fraction of its value, but also causes other innocent parties injury and suffering, for which neither the respondent nor they can have a remedy of any kind against any person.

Second. The next person affected by the decision in this case is the appellant Yordy. What are his equities? If our original contention is right, then the original certificate of delinquency is void, for the reason that there is no legal description of the property. In such case a remedy is provided by law against the county. He can recover the amount of the certificate of delinquency with interest at 6 per cent. (Laws of 1897, page 181), and the county can then reassess the whole amount on the property, since, as above suggested, there is no statute of limitation for the collection of the taxes. The only loss that he sustains, therefore, is insignificant compared to the gravity of the consequences which must fall upon this respondent and fifty other innocent men. Furthermore, the rule applying to a procedure at a tax sale is that of *"caveat emptor."* This just rule applies to all judicial sales, and its cogent language is pregnant with the suggestion that such purchaser is not entitled to equitable protection. "Purchaser, beware!" says the law, which universally means that he is not a purchaser without notice, or for valuable consideration, or in good faith. It is notorious that a purchaser at a tax sale takes his chances as to the validity of all the prior proceedings; hence his equities are also overbalanced, when contrasted with the absolute loss of

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[* Figures in parentheses are original pagination in red ink.]

property of the owner, leaving him no remedy of any character against any person.

"While it is doubtless the duty of the citizen to pay all taxes legally assessed upon him for support of the government, yet the validity of the proceeding, taking his land against his will in the discharge of his tax, depends upon *no considerations of equity*, but upon a strict compliance with the regulations previously prescribed by statute for the *double purpose* of securing the payment of the taxes and of *protecting the citizen against unnecessary sacrifice of his property.*"

(2)

Foster *v.* Foster, 129 Mass., 559.

The quotation above made from the Supreme Court of Massachusetts strikes at the very root of the attitude which the courts should assume in dealing with tax titles. It is no less the sacred duty of the court to protect the citizen against unnecessary sacrifice of his property than it is to enforce payment of the tax.

Is a tax title in this State so sacred a right that this court, in testing its validity, feels in duty bound to relax the application of fundamental principles of law? It cannot be so, in view of the character of the equities of the respective parties involved; hence we say that before the court by its decision permits a deprivation of property of so many persons affected, for the benefit of one who by law is charged with notice of infirmities of a tax title, and warned to take his chances, it should pause to gravely consider the applicable rules of law, and deprive the owner of his property only when the forms of law have been duly complied with.

With these suggestions, we respectfully bespeak a careful consideration of the argument in support of the petition.

(3)

Second Ground of Re-argument.

The Act of 1903, chapter 137, Laws 1903, page 262 (Bal. Code, Sec. 5511*a*) was intended to abrogate the rule laid

down in Ward *v.* Huggins and Carey *v.* Merritt, and repeals sections 5678-9, Bal. Code, in so far as they were held to apply to actions in ejectment.

In order to fully understand the meaning and object of this new act, it is necessary to consider the status of the law on the subject prior to its enactment.

Prior to the passage of the Act of 1903, there was no express provision in actions in ejectment to recover taxes paid by occupant. He was allowed the value of permanent improvements made by him in good faith (Sec. 5511, Bal. Code); and at common law in such action he could not recover the taxes paid by him, it being the universal rule at common law that in such case taxes paid by the defendant were not a part of the improvements, however much such payment may indirectly enhance their value.

> Sedgwick & Waite on Trial of Title of Land (2nd ed., Sec. 688, p. 513).

In several States there existed special provisions for reimbursement of taxes paid in such cases, in order to avoid the plain rule at common law; but in Washington, prior to the passage of the Act of 1903, no such provision was made, and hence no recovery could be had. The court, however, held, in Ward *v.* Huggins and Carey *v.* Merritt, cited in the opinion in this case, that sections 5678-9 covered just such cases.

(4)

Without attempting to criticise the holding of the court in these cases, it is manifest that the sections (5678-9) in question were not found in that part of the statute relating to actions to ejectment and the phraseology and history of their enactment would seem to indicate and strongly support the view that they had reference to actions brought to recover lands sold for taxes which were *vacant,* since in actions to recover *possession* of real property the issues tendered by the pleadings were confined by statute to the sole question of ownership and possession. Thus section 5508 confined the

plaintiff to plead his title, and nothing more, and the defendant was confined to pleading a legal and equitable title, and the verdict of the jury or (in case of trial by the court) the findings of fact were limited to questions of "whether the plaintiff or defendant was entitled to recover." (See Sec. 5510, Bal. Code.)

It is difficult, therefore, to see how it was, in view of these provisions, that sections 5678-9 could apply to actions for possession, since they were apparently inconsistent with and contradictory to the whole scheme in ejectment provided by sections 5500 to 5518, Bal. Code, which did not allow questions of tender or payment of taxes to be litigated.

Having in mind, however, the omission which the legislature made in section 5511 by failing to provide for reimbursement of taxes, it is easy to see why it was that the court was obliged to give the construction and effect to sections 5678-9 which it did in Ward *v.* Huggins and Carey *v.* Merritt. It was apparent that unless the court held that the sections referred to applied to actions in ejectment, as well as to actions to quiet title, there could be no recovery of such taxes. It must have been considered by the court that a hardship would result to the defendant in such action, and that, unless the sections were held to apply, he would lose the taxes paid by him. The court therefore put the construction in order to avoid the rule at common law. But, on the other hand, while intending, in the interests of justice, to put an equitable construction upon the statute, the rule itself became harsh in operation and the fullness of its hard-

ship is manifested in Merritt *v.* Carey, where the plaintiff, by mere technical omission to plead tender in his complaint, was obliged to lose his property for a fraction of its value to the tax-holder, resulting in practical injustice to the plaintiff. The soundness of plaintiff's argument in that case, against the rule, is unanswerable. It was claimed that plaintiff could not be presumed to know upon what the de-

fendants in possession based their right until informed by their answer; that it could not well be anticipated by plaintiff that defendant would rely upon a tax title until the answer was made; hence to require plaintiff to tender taxes in advance in his complaint was not only illogical, as a matter of pleading, but extremely harsh and oppressive on principle and in practical operation. The soundness of this argument was not questioned by the court on principle, but the court disposed of the contention, not because it was unsound, but because in its opinion it was bound by the statutes (5678-9), as construed in Ward *v.* Huggins. In other words, whatever hardship may have resulted from the operation of the rule, the court, in Carey *v.* Merritt, left it to inference, that the fault was with the statute and not with the court in laying down the rule.

We have thus referred to the history of the legislation in force on this question, prior to enactment of law of 1903, in accordance with the elementary principle, "that the legislatures are presumed to know existing statutes and the state of the law relating to subjects with which they deal."

Sutherland, Stat. Cons., Sec. 287.

What, then, is the intent of the law of 1903, in the light of the existing law at the time of its passage, as above outlined? It is our contention that the intent was twofold:

1st. To abrogate the rule in Ward *v.* Huggins and Carey *v.* Merritt.

2d. To repeal sections 5678-9, in so far as they were heretofore construed by the court to apply to actions of ejectment. The Act of 1903 provides by section 1 as follows (so far as here important):

(6)

"In an action for the recovery of real property upon which permanent improvements have been made, *or general or special taxes have been paid by defendant,* * * * in good faith, under color or claim of title adversely to the claim of plaintiff, * * * the amount of such taxes, with

interest thereon from date of payment, *must* be allowed as counter-claim to the defendant."

Section 2 provides:

"The counter-claim shall set forth * * * the amount of said taxes so paid and the date of payment. Issues shall be joined and tried as in other actions * * * and the amount of said taxes apart from the improvements must be specifically found."

Section 3 provides that "if judgment be for plaintiff for recovery of property," that defendant be allowed to recover the "amount of taxes and assessments," etc.

Section 4 repeals all acts and parts of acts in conflict with this act.

The court will observe that this act, for the first time in the history of legislation of this State, introduced a new rule of law in actions of ejectment.

The act, by section first, divides the classes of cases in which the defendant must in his answer set up the amount of taxes paid into three:

1st. Where permanent improvements have been made; *or*,

2d. Where general taxes have been paid by the defendant; and,

3d. Where both the improvements have been made and general taxes have been paid.

This is evident from the plain language of section first, which reads as follows:

"In actions for the recovery of real property, upon which permanent improvements have been made, *or* general taxes have been paid by the defendant," etc. The language used is in disjunctive, "or," in the first section, and again in section 3, where it reads: "should the value of improvements, *or* taxes, exceed, etc., the damages, the plaintiff shall within two months pay to defendant," etc.

There can be no question, therefore, that the new statute applies to cases where the defendant paid taxes, irrespective

of the question of whether he also made improvements or not. In other words, in a case where defendant is in pos-

(7)

session without improvements, but where he has paid taxes on the property, he can recover them in the action, *provided* he sets them up in his answer by way of a counter-claim.

The questions which naturally suggest themselves in this connection are:

1st. Is this act intended to apply only to those cases where the taxes are paid by the defendant and are merely current or delinquent taxes, or is the intent also to cover those cases where the taxes paid were paid at a tax sale in acquisition of a tax title?

2d. If the intent is to cover *all* taxes, no matter under what circumstances paid, is the remedy given by Act of 1903 exclusive remedy?

3d. Does it repeal sections 5678-9, in so far as they were held to apply to actions in ejectment?

The first question thus propounded is easy of solution. In the first place, the words thus employed in the act are "taxes" and are used in the general sense; the act does not limit the recovery to cases of "current taxes" or "delinquent taxes," but broadly—general taxes—and in the popular meaning of the words "payment of taxes," popularly includes payment of taxes at a tax sale, and while technically there may be a distinction made between payment of taxes and payment at a tax sale, the words in the statute, according to the cardinal principles of construction, will be construed as employed in their popular sense. Where a word having a technical as well as a popular meaning is used in the statute, the courts will accord to it its popular signification, unless the very nature of the subject indicates that it is used in its technical sense.

Sutherland, Stat. Cons., Sec. 250.

Independent of this consideration, there can be no doubt of what was meant by "taxes" in this act, in view of what was said in the first place as to the decision of Ward *v.* Huggins and Carey *v.* Merritt.

Those decisions construed sections (Secs. 5678-9) as applying to just such cases as this. It was held in those two cases that before plaintiff could attack the validity of a tax

title he would have to tender the taxes paid on such title, with all other taxes. The rule thus laid down, because of necessity, had an unquestionable tendency, as already indicated, to work hardship in many cases. Such being the law, the legislature in 1903 thought it wise to enact the present law for the purpose of *avoiding the effect of Ward v. Huggins* and Corey *v.* Merritt. That such is the intent is evident, we believe, from the following considerations:

In the first place the act in question specifically refers to actions brought for recovery of lands in adverse possession, under color of title, so as to unmistakably point to the application of the act only to actions in *ejectment*. In the second place, it does not limit the right of recovery on the part of the defendant to cases where improvements are made, but also to cases where taxes are paid irrespective of improvements.

Is it possible to reconcile the Act of 1903 with sections 5678-9 in this respect, and hold that the Act of 1903 refers only to general taxes paid subsequent to a tax sale, while sections 5678-9 refer to both? If so, which law is to govern in a given case? With which law must the parties litigant comply at their peril? Must the plaintiff tender *all* the taxes under sections 5678-9, which provide, as construed by this court in the cases referred to, that *all* taxes must be tendered whether paid *at* or subsequent to the sale? If so, what effect is to be given to the law of 1903, which admittedly covers *some* of the taxes included within the purview of sections 5678-9, and which prescribes a different rule?

Surely, if the plaintiff must still comply with sections 5678-9 as to tender, notwithstanding the fact that the law of 1903 covers at least some of the taxes, then the law of 1903, in so far as it introduced a radical change in the law in the specific matter of reimbursement of taxes, is wholly meaningless in the very respect for which it was thus enacted. But such construction runs in the very teeth of the universal rule of construction that the legislature meant something when they enacted this law.

As stated by Mr. Sutherland in section 240 of his work, all

parts of an act must be brought into harmony and "so constructed that *no clause, sentence or word shall be void, superfluous or insignificant.*"

The fact is that unless the purpose of the legislature was to avoid the effect of Ward *v.* Huggins and Corey *v.* Merritt there is no meaning to the law of 1903. No other valid reason can be assigned for the enactment. But it is wholly immaterial for the purpose of this discussion whether this position is right or wrong, since further consideration, to be presently urged, will, we believe, dispel any doubt upon the subject. And this brings me to the second question.

I.

Is the Remedy Provided by Act 1903 Exclusive?

It must be conceded that the Act of 1903 provides a remedy for the reimbursement of defendant for taxes paid by him. Assuming that it has reference only to taxes paid subsequent to a tax sale, and that the remedy provided by sections 5678-9 is still in force, what is the result?

It is that plaintiff must tender in his complaint not only the taxes paid at the sale, but also the subsequent taxes, and the defendant must in his answer, notwithstanding the plaintiff's tender, *also* plead by way of counter-claim the very taxes which the law requires the plaintiff to tender in his

complaint. The confusion likely to result from such construction is so evident that no further comment is necessary to show the absurdity of such construction. It is absurd to attribute to legislature any such intent, for it is not likely to be presumed that they would pass the law in question merely for a joke or to create an irreconcilable confusion in its operation. On the other hand, can the two acts stand together and be harmonized, so that the question of pleading the taxes can be left optional with the plaintiff? Or in case he fails to do so, then the defendant must set up his counter-claim. The statement of the proposition shows its own absurdity. Sections 5678-9 have been held in Ward *v.* Huggins

and Corey *v.* Merritt *so mandatory* in character that the court in the latter case held a mere failure to plead the tender fatal to plaintiff, and would not even allow him to amend. Hence to construe the act as optional is impossible in view of that decision. On the other hand, the Act of 1903 is no less imperative in its requirements, since it expressly provides that the "counter-claim shall set forth the amount of the taxes so paid," etc. It is, therefore, impossible to give such construction.

It is evident, therefore, either that sections 5678-9 are still *exclusively* in force or else the Act of 1903 is not *exclusively* in force. They cannot stand together and both be in force, since they cover at least a part of the same subject and provide totally different remedies. If it is held that sections 5678-9 are still in force, then, as a logical consequence, the provisions of Act of 1903, in so far as they apply to the same taxes, are "void, superfluous, and insignificant," and no defendant is to be required to set up a counter-claim, although the Act of 1903 expressly says he must. Nor is it possible to so construe the acts together as to make sections 5678-9 apply to a part of the taxes, since such construction would cause unnecessary confusion and difficulties in practice—a result not likely intended without a positive expression to that effect in the law of 1903.

The fact is that the legislature by the Act of 1903 intended to provide a different and exclusive remedy in cases of ejectment than that provided by sections 5678-9, which the court held applicable to ejectments. If the sections 5678-9 still stand, they stand as *general* statutes, modified by the law of 1903, which contains *specific* provisions relating to ejectments.

In this connection the principle of construction universally applied is thus stated by Sutherland, Sec. 325:

"It is within this cognate principle that *specific* provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law, which might otherwise be broad enough to include it." And again: "Where a statute gives a right and prescribes a

particular remedy, such remedy is exclusive." And again, in section 326 he lays down the rule: "Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded."

These elementary principles are cited in support of the maxim "*Expressio unius est exclusio alterius.*" That the maxim in question applies here in full force can admit of no doubt, since no reasonable reconciliation of the two enactments (covering the same subject, but differing radically in the manner of enforcement) is possible. But, to put the matter at rest, we claim that the Act of 1903 expressly repeals sections 5678-9, and this brings us to the consideration of the next question propounded:

II.

Sections 5678-9, in so far as They Apply to Ejectment, are Expressly Repealed by Act of 1903.

Section 4 of Act of 1903 reads as follows: "All acts and parts of acts in *conflict* with this act are hereby repealed."

The words "*in conflict* with this act" are significant. The universal rule is: "When there is inserted in a statute a provision declaring a repeal of all inconsistent acts or parts of acts, there is an assumption that the new rule to some extent is repugnant to *some* law enacted before."

Sutherland, Sec. 147.

With what acts, then, is the Act of 1903 in conflict? Surely it cannot be with section 5511, Bal. Code, since that section incompletely provides for the allowance of value of improvements as a set-off against the damage, and the Act of 1903 is not in conflict with, but in fact supplementary to and amendatory of, the provisions of section 5511. The Act of 1903 enlarges the scope of the remedy of a defendant in ejectment, as already provided by section 5511. In no sense can it be said, therefore, to be in *conflict* with section 5511. What acts, or parts of acts, then, are in *conflict* with this act?

It is evident, from this provision, that the legislature had in mind some part of a former law which it considered in *conflict* with this act (Sutherland, Sec. 147). Some force or meaning must be given to the significant repealing words of this section. The fact is that the only statute or law in the State of Washington which can be construed to be in *conflict* with this act are sections 5678-9, Bal. Code. To demonstrate the truth of this assertion is simply to go over the whole argument again which we made under the first head of this brief.

But the fact remains that unless sections 5678-9 are the sections in conflict, in so far as they apply to ejectment, there can be found no other law. The laws and statutes will be searched in vain to find a simple provision, aside from sections 5678-9, in conflict with this act. Hence to give any meaning or significance to section 4 of this act there is no escape from applying them to sections 5678-9.

That the Act of 1903 is in conflict with sections 5678-9 becomes evident upon a cursory examination of the two laws.

The law of 1903 requires the defendant to set up in his counter-claim the taxes he has paid, thus providing, as already shown, the *exclusive* remedy by which he can be reimbursed in case the plaintiff prevails in the action, while, on the other hand, sections 5078-9, as construed by the court, require the plaintiff to make a tender in the complaint of the taxes paid by the defendant. The scheme in the one case is not only inconsistent, but diametrically opposed to the scheme in the other; hence to state the provisions of the one and the other is to demonstrate a direct *conflict* of the two. Upon no other theory can the repealing clause of Act of 1903 be given any meaning or significance.

In view of the foregoing considerations, it is unnecessary to consider whether the Act of 1903 repeals the section in question by implication. But it is submitted that had the Act of 1903 contained no repealing clause at all the result must be the same.

(13)

It must be admitted that by the Act of 1903 the legislature had some reason to provide a *different* remedy for reimbursement of taxes paid by defendant in ejectment cases. Hence, to that extent it modified or revised sections 5678-9, in so far as they were held to apply to actions of ejectment.

The rule of construction in such case is thus stated by Mr. Sutherland (page 208):

"Does a revision import that it shall displace the last previous form; that it is evidently intended as a substitute

for it; that it is intended to prescribe the only rule to govern? In other words, will a revision repeal by implication previous statutes on the same subject, though there be no repugnance? The authorities seem to answer emphatically, Yes. The reasonable inference from a revision is that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject-matter in force at the same time, and that the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law."

It is confidently submitted, therefore, that the Act of 1903 either expressly or by implication, but in any event most emphatically, sweeps away and repeals sections 5078-9, and therefore sweeps away and abrogates the rule based upon the statute laid down in Ward *v.* Huggins and Corey *v.* Merritt.

It is evident, therefore, that the court's opinion in this case, in so far as it prohibits plaintiff from attacking the title without tendering taxes in the complaint, is not the law of the State of Washington, because it was based upon sections 5678-9, which have been repealed. The court's attention not having been directed to the Act of 1903, it made an unintentional but palpable mistake of law.

It is inevitable that had this question been presented to the court upon the hearing it could not have done otherwise than to hold the Act of 1903 abrogating the rule laid down in the opinion, resulting in a decision affirming the lower court.

(14)

The holding in question could not have been reasonably anticipated by counsel, since the lower court held the description in the tax deed inapplicable to plaintiff's land, and it was, therefore, unnecessary to raise the question in this court as to the effect of the Act of 1903. The decision, being based upon a repealed law, is manifestly wrong, and in justice and right the respondent is entitled to a rehearing upon the facts of the case in the light of the provisions of

the Act of 1903, the law in force at the time of the trial in the lower court and at the time of hearing in this court.

(15)

Third Ground for Re-argument.

Having shown that the Act of 1903 repeals the rule laid down in the opinion, we can show on rehearing that the tax deed was void, because:

1*st. The blocks of land were sold in excess of the amount allowed by law.*

The amount of judgment against block 352, as finally entered, was $76.74, and against block 372 was $76.77. The treasurer's returns show that he sold block 352 for $82.11 and block 372 for $82.15. Was this legal?

The law in force at the time of sale is found on pages 300-1, Laws 1899. The law required the judgment to contain an order to the treasurer in the following words:

"Said order shall be signed by the judge * * * and be delivered to county treasurer, and shall be full and sufficient authority for him to proceed to sell said property or so much thereof as may be necessary *for said sum as set forth in said order.*"

The "said sum as set forth in said order" was $76.74 against block 352 and $76.77 against block 372. (See judgment.)

The notice of sale to be published is required to state (see p. 301, Laws 1899) that the treasurer will "sell the following-described lands, or so much of them as shall be sufficient to satisfy the full amount of taxes, assessments, penalties, interests and costs, *adjudged to be due thereon.*" And on page 301, with reference to the price for which the land must be sold, it is provided as follows:

"The person at such sale offering to pay the amount *due* on each tract or lot for the least quantity thereof, shall be the purchaser."

It is manifest from these provisions that the only amount for which the treasurer could legally sell the block in question was the amount set forth in the "judgment" or "adjudged to be due thereon."

(16)

The fact is he sold block 352 for $82.11, or $5.37 in excess of the judgment, and sold block 372 for $82.15, or $5.38 in excess of the judgment. Was such sale void? It is absolutely void under all authorities. It has been decided everywhere but one way. The rule in such case is thus laid down by Mr. Cooley (3rd ed.) on page 955:

"The statutory power is a power to sell for lawful taxes and lawful expenses, and if it is exceeded by including unlawful items, the power is exceeded and its exercise is invalid *in toto* from the manifest impossibility of saving the sale in part, when the invalidity extends to the whole. Nor can the maxim *de minimis* be applied, so as to prevent a slight excess from invalidating the sale."

Cooley on Tax. (3rd ed.), pp. 955-6.

This rule is abundantly supported by authorities, both Federal and State. To the same effect and exactly in point see:

Black, Tax Titles (2nd ed.), Sec. 232-236.

We have taken pains to examine some of the cases cited in support of this rule and beg to cite the following as exactly in point:

Treadman *v.* Patterson, 51 Cal., 637.
Harper *v.* Rowe, 53 Cal., 235.
McGrath *v.* Wallace, 116 Cal., 552.
Simmons *v.* McCarthy, 118 Cal., 622.
Goodrum *v.* Ayers, 56 Ark., 93.
Cooper *v.* Freeman, 61 Ark., 36.
French *v.* Edwards, 13 Wall., 506.
Genthur *v.* Lewis, 24 Kans., 309.
Blanchard *v.* Hatcher, 40 Kans., 350.
Bump *v.* Jepson, 106 Mich., 641.
Security Trust Co. *v.* Hyederstant, 64 Minn., 413.

The reason for this rule is thus stated by the Minnesota court (64 Minn., 413):

"The treasurer's authority to sell is statutory and limited. It is elementary that public officers whose authority is wholly statutory must exercise that authority in conformity with the statute. The treasurer was invested with power to sell in the

way and amount prescribed by statute."

The statutes of Washington above quoted are so explicit in limiting treasurer's power of sale to the amount adjudged by the judgment that nothing need be said in support of this point except to read the statute, which is so plain "he who runs may read."

The treasurer, illegally and in violation of the statute and the express order of the court set forth in the judgment, sold the blocks for amounts largely in excess of the limit set by law. If he could disregard the statute and the judgment in that respect, he could likewise sell it for less. In either case the sale is void, because not authorized by law.

That there can be no doubt of the invalidity of such sale the authorities cited, which can be multiplied tenfold, will abundantly testify.

2nd. The tax judgment is void for want of jurisdiction, because the tax summons is not in conformity to law.

a. In the first place, it is void because it does not inform the defendants that any complaint was filed in court, or that it was filed at all. This court has repeatedly held that in tax foreclosure proceedings the *form* of summons and its contents must conform to section 4878, Bal. Code.

Williams *v.* Pittock, 35 Wash., 271.
Woodham *v.* Anderson, 32 Wash., 500.
McManus *v.* Morgan, 80 Pac., 786.

The summons in this case nowhere states or informs the defendants that any complaint has been filed nor where it is filed.

The form given in section 4878 requires the statement that the "complaint has been filed with the clerk of said court."

That section provides for a publication of summons generally, and contains this proviso: "Provided that publication of summons shall not be had until after filing of the complaint."

The requirement for filing complaint before publication must certainly be regarded as jurisdictional from the forcible language of the statute that no publication shall be had *until after* the filing of the complaint.

(18)

26 Ency. of Law, 678-692.
Sedgwick on Statutory Cons., 49.
Voorhees *v.* Bank, 10 Pet., 449-471.
Sutherland, Stat. Cons., Secs. 454-455.

That the filing of the complaint is jurisdictional has been held in other States where the statute is not nearly as mandatory as the one under consideration.

Anderson *v.* Coburn, 27 Wis., 558.
Witt *v.* Myer, 69 Wis., 595.
35 N. W., 25.
61 Wis., 185.
99 Mo., 638.
22 Fla., 274.
17 Ency. Pl. & Pr., 51.
Kleber, Void Judicial Sales, Sec. 122.

All these cases proceed upon the theory that, service by publication being in derogation of common law and being unknown to common law, the validity of such service is dependent wholly upon a strict and literal observance of the statute which authorized it.

It will be observed that section 4878, after prescribing the necessity of the filing of the complaint, states in a general way what the summons shall contain, without specifying all the requirements necessary for a valid summons, and ends by the following mandatory language: "Said summons for publication *shall* be substantially as follows." The form given in this section, among other things, requires the defendant to answer the complaint, and "in case you fail so to do, judgment will be rendered against you according to the demand of the complaint, which has been filed with the clerk of said court."

The summons under consideration is absolutely silent on the subject whether the complaint has been filed or not, and there is nothing in the summons which would substantially inform the defendant that any complaint was filed in the court.

The failure in the summons to state that the complaint has been filed is a substantial departure from the statutory requirements for a summons, and therefore the court acquired no jurisdiction to enter judgment, and that the judg-

ment entered there is wholly void.

Brown on Jurisdiction, Sec. 41.
Wade's Law of Notice, 2nd ed., Sec. 1030.
26 Amer. & Eng. Enc. of Law, p. 692.
Sutherland, Stat. Cons., 454-455.
Maxwell on Interpretation of Statutes, 333-337.
Blackwell on Tax Titles, 287-288.
Odell *v.* Campbell, 9 Ore., 298, 305.
Lynam *v.* Milton, 44 Cal., 630.
Hayes *v.* Lewis, 21 Wis., 663.
Kendall *v.* Washburn, 14 How. Pr., —.
Dutham *v.* Betterton, 79 Texas, 223.
Fenkes *v.* Carl, 75 Ia., 152.
Black *v.* Clendon, 3 Mont., 4148.
Calkins *v.* Miller, 55 Neb., 601.
Delaware *v.* Bank, 77 S. W., 678 (Tex.).
20 Enc. Pl. & Pr., p. 1115.
Clifford *v.* Tomlinson, 62 Minn., 197.
Martin *v.* Baldwin, 30 Minn., 537.

In all of the foregoing cases the omission to state any of the things required by the statute is held fatal to jurisdiction, whether the statement of the particular thing thus omitted was needful or not.

It would seem that this court is also in line with the general line of authorities, as will be found by examination of the following cases:

Woodham *v.* Anderson, 32 Wash., 500.
Thompson *v.* Robbins, 32 Wash., 149.
Bailey *v.* Hood, 80 Pac., 559.
Dolan *v.* Jones, 79 Pac., 640.
Young *v.* Droz, 80 Pac., 810.

It is no answer to this to say that any defendant might himself find out from the clerk of court whether the application was filed or not, for the reason that the statute requires that information to be in the notice. In reply to such suggested contention the Minnesota Supreme Court says: "It is not enough that the notice furnishes means of information. The statute does not make that an equivalent to the information it requires the notice to give." We submit, therefore, that the notice and summons is void and the court acquired no jurisdiction.

3rd. The judgment is void because the summons was for defendant to answer "within 60 days after first publication" instead of "within 60 days after the date of the first publication."

(20)

This is misleading; "60 days after *first* publication" means 60 days after the expiration of a week from the date of the first publication. Such summons is void.

Woodham *v.* Anderson, 32 Wash., 500.
Thompson *v.* Robbins, 32 Wash., 149.
Bailey *v.* Hood, 80 Pac., 559.
Dolan *v.* Jones, 79 Pac., 640.
Young *v.* Droz, 80 Pac., 810.

4th. The judgment is void because no certificates of delinquency were ever filed.

The statute requires the certificates to be filed *before* any steps are taken to foreclose the same.

Laws 1901, p. 385.

That such filing is jurisdictional see authorities cited under the subdivision of this argument wherein we claim that the failure of summons to state that complaint was filed is fatal to jurisdiction. See also—

27 Wis., 558.
69 Wis., 595.
61 Wis., 185.
99 Mo., 638.
22 Fla., 274.
Kleber, Void Judicial Sales, Secs. 106 to 123.
Brown on Jurisdiction, Sec. 46.

There can be no question, under the authorities above

referred to, that the filing of the certificate is jurisdictional, since this is a proceeding in derogation of the common law. The record conclusively shows that no certificate was *ever* filed in this tax proceeding. Hence, it conclusively appears that one of the essential steps to confer jurisdiction upon the court has not been taken. It is therefore void, even under the authorities of this State.

Wash. Timber Co. *v.* Smith, 34 Wash., 635.

(See authorities cited above under the head as to necessity of filing complaint.)

There are many other defects in the tax proceedings in question, which can be shown upon re-argument or a new trial of the case to avoid the sale. But for the purposes of

the petition for re-argument, it is deemed sufficient to point out the above defects, showing the absolute nullity of the tax title, even if the description is held sufficient.

We shall under another head show that this court made a clear mistake of law in ordering judgment for appellant without a new trial. It is sufficient here to say that to reverse the case without permitting a new trial, in view of so many fatal defects in the title is manifestly unjust, and amounts to a denial of hearing of any defense.

The court based its direction of judgment upon the ground that, inasmuch as the respondent failed to tender taxes, it could not attack the tax title or tax judgment, but we have already shown that the court's holding in that respect is wrong, and the law on which it was based was repealed by the Act of 1903. Hence the most that this court could do would be to reverse and send the case back for a new trial, since the direction for judgment was erroneous in view of Act of 1903.

We, therefore, submit that the court should, in view of the defects pointed out, either grant a rehearing or affirm the judgment of the trial court.

(22)

Fourth Ground for Re-argument.

The direction for judgment quieting title of applicant is in violation of the constitution of the State of Washington and the statutes of the State.

The order for judgment in this case is as follows:

"The judgment of the superior court is reversed and the cause is remanded, with instructions to enter a decree quieting title of the appellants."

The effect of this order is to utterly deprive the trial court of any discretion in the case, except to obey the specific directions of the order. By its own language the order pre-

vents a new trial or making any further additional findings of fact.

It is a universal rule that where a judgment is reversed and the cause is remanded with specific directions the lower court must yield obedience to the directions given.

Elliott on Appellate Procedure, Sec. 576.
13 Enc. Pl. & Pr., 846.

Such order is in the nature of a special power of attorney, by which the power and authority of the lower court is limited.

Choteau *v.* Allen, 74 Mo., 56.
Piper *v.* Sawyer, 80 N. W. Rep., 970.

It is obvious that such order would be proper in a case where the conclusions of law of the lower court were not justified by the findings of fact, in which event the judgment of the Supreme Court would stand in place of the conclusion of the lower court upon the findings already made. But this is not such case. The effect of the decision is to hold that the findings of fact of the lower court are not justified by the evidence, since the court holds that the description of the land is sufficient, while the lower court has held by its sixth finding that the description in question does not

describe the property of respondent. How, then, can the judgment of this court be entered upon the findings which have already been made, unless it is implied, as it must necessarily be, that this court in effect has found the facts exactly opposite to the findings of the lower court? Has this court power, under the constitution of this State, to make an original finding of fact? Certainly not. The constitution of this State, article 4, section 4, limits the jurisdiction of the court to cases of an appellate nature. It can only review the errors of the trial court, or order judgment, in

cases where the facts are all found by the lower court, and the error lies in the application of the law.

3 Cyc., p. 451.

It has no power to make findings of fact, since that is the exclusive province of the trial court.

3 Cyc., 456, and cases cited.

This principle is well stated in Kellog *v.* King, 114 Cal., p. 378, where the lower court made findings of fact for the defendant, although the uncontradicted evidence entitled plaintiff to judgment, as found by the Supreme Court on appeal. The Supreme Court was asked to order judgment in plaintiff's favor without the necessity of new findings or a new trial. In reply to this the court said:

"Plaintiff asks us that if the judgment is reversed, to order judgment in his favor, without the necessity of a new trial. This we are not at liberty to do. This court has no power to make findings of fact—that being the exclusive province of the trial court. Since the findings are against the plaintiff, any judgment we should order would be exactly in the position of the present judgment—unsupported by the findings. It is only when the findings made by the lower court are such as to support a judgment for the appellant that this court, in reversing a judgment erroneously entered thereon, has *jurisdiction* to order proper judgment to be entered. In the present case, therefore, there must be a new trial."

This is exactly such case. There are no findings ordered which of themselves would authorize the judgment as or-

dered by this court; hence, upon coming down of the mandate of this court, which must be obeyed to the letter, as we have already shown, the trial court will enter judgment wholly unsupported by any findings of fact.

That such procedure has never been known in any court of the Union can be demonstrated by examination of cases cited in 3 Cyc., p. 456, and 3 Cent. Digest, p. 4610. It will

be observed that by the order for judgment in this case the court prevents the trial court from taking any proceedings not inconsistent with the opinion of this court, which is unheard of in the law of procedure. It prevents this respondent from showing any other facts either under its present pleadings or under any amendment of pleadings that might be made not inconsistent with the decision of this court. For instance, this respondent might show under the amended answer that the tax judgment and deed were void because they were procured by fraud and conspiracy on the part of the tax officer or other parties connected with the foreclosure of the tax. Upon a new trial respondent might be able to show that it had actually paid the taxes for the alleged non-payment of which the tax foreclosure judgment was entered, or it might show that it had acquired by quitclaim deed the title of the appellant. Other facts might be shown under amended pleadings upon a new trial to avoid the effect of the tax deed and judgment.

The court will observe that none of the foregoing suggested defenses to the tax judgment were necessary, since the lower court has held that the tax judgment and deed did not cover the property in controversy. It is obvious that, in view of such holding at the time of the trial, it was wholly unnecessary for respondent to rely upon any other defense, but since this court is of a contrary opinion, we cannot see why it should deprive us of the right of defense by a mandate of this character, which is wholly unsupported by any findings of fact. The only cases in which an order of this kind can be made are cases where the facts have been found by the trial court.

3 Cyc., 450.

(25)

We, therefore, respectfully submit that by the order in this decision the court has invaded the province of the trial court, in violation of the constitution of this State, and prevents the lower court from assuming jurisdiction and allow

amendments to be made, or to further try the case upon any theory not inconsistent with the opinion of this court.

6th. The judgment of this court exceeds the limits of relief permitted by law.

In ordering judgment to "quiet defendant's title" the court has evidently overlooked the character of this suit.

The action was brought to recover *possession* of property which was withheld by the appellant. This is admitted in the opinion. It is practically a common-law suit in ejectment, except as modified by statute. At common law the only issue was "not guilty."

Sedgwick & Wait on Trial of Title to Land, Sec. 476.

No affirmative relief and no equitable defenses were allowed to be pleaded. The statutes of this State have modified the practice so that it allows a defendant "to set up a *legal* or *equitable defense* to plaintiff's claim of title."

Bal. Code, Sec. 5508.

But this section says nothing about allowing a defendant to set up a counter-claim asking for affirmative relief, "quieting title" in him, and, being in derogation of common law, it is not to be extended by implication to allow a counter-claim which was not allowed at common law. Again, this section, by its own terms, limits the answer of defendant to *defenses*, legal or equitable, and on the principle of "*expressi unius est exclusio alterius*" it forbids an affirmative relief to be asked. Moreover, by section 5510 of Bal. Code the finding of the jury (and, therefore, of the trial court, where jury is waived) is limited to the single proposition "that plaintiff is not entitled to possession of the property described in the complaint."

(26)

See subdivision 2, Sec. 5510, Bal. Code.

It is palpable, therefore, that even if the appellant asked for the affirmative relief "to quiet his title" it could not be granted, for it is wholly foreign to the issues of such action under the statutes of this State above cited. But the fact is that the defendant never asked for such relief in his answer. The prayer of the answer is "that the action be dismissed with costs." This is all they could ask for under the statute. To have awarded a judgment quieting title, if one was authorized by the statute and the law, might have been justified, where such relief was prayed for, but to award a judgment which is neither authorized by law nor demanded by the party in whose favor it is granted is positively unheard of in any country where the courts are supposed to administer justice according to rules of law.

The most that the appellate court can do under any code is to order the judgment which the trial court should have rendered, but it is error for any trial court to give any party greater relief than he asks.

Barnes *v.* Williams, 11 Wheat., 415.
Word *v.* Cochran, 150 U. S., 608.
Saltonstall *v.* Birtwell, 150 U. S., 419.
Chicago, &c., R. Rd. *v.* Meyer, 19 N. E. Rep., 320.

In Washington the appellate court can direct judgment *on the facts found.* If no statement of facts are presented to the court they are presumed to sustain the judgment; error for trial court to award plaintiff more damages than he claims in his complaint.

Gaffney *v.* McGrath, 39 Pac., 973.

Under any code the appellate court cannot order judgment to be entered by a trial court on a state of facts upon which it would have been error for the trial court to have entered such judgment.

This is axiomatic, because the two courts are subject to the

same law, and an identical state of facts in the two courts gives identical rights.

(27)

No litigant is given, in any court where the common law prevails, greater relief than he prays for, and it is error for the trial court to give greater relief than asked for by the prevailing party, which the appellate court will correct. This is the law even in Washington.

Gaffney *v.* McGrath, 11 Wash., 456; 39 Fed., 973.

The defendant in this case asked for no affirmative relief, but only that the complaint be dismissed. For this court to order that judgment be entered quieting title in defendant is the commission of an error which if committed originally by the trial court this court would have been compelled to modify under its own decisions.

When an appellate court reverses the judgment of a lower court, it will order judgment for the appellant only in cases where it is clear that no injustice will thereby be done. When this is not clear, the case will be sent back for another trial.

This is axiomatic, because appellate courts, like inferior courts, are part of the machinery for the administration of justice, not injustice.

It is the statute law of most States that either party to a possessory action for land shall be entitled, as a matter of right, to a second trial. This rests upon the well-known fact that in the trial of title to realty so many unforeseen and unforeseeable facts may arise that to limit a party to one trial would, in many cases, produce injustice.

This is not the statute law of Washington, but the reasons for this statutory rule should be cogent in persuading this court to be slow in ordering judgment quieting title in defendant, when the only relief he asks is that the complaint be dismissed. That is the maximum relief that this court should grant; but since it is impossible for this court to

know the thousand and one equities in this case, the relief given appellant should be the granting of a new trial.

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To illustrate:

Suppose that the respondent during the pending of this action has sold all these lots to some fifty different citizens of North Yakima for about one-third of what they are worth today. Suppose that some of these people have improved some of these lots. If title is quieted in defendant, these parties are concluded by the judgment, and even lose their betterments.

Suppose that for one dollar which the respondent loses innocent citizens of North Yakima lost three. This supposition squares with the facts. It well illustrates why a court should not give a litigant greater relief than he asks for, and also why a court should be slow, in an action for the possession of realty, in forbidding a party a second trial, in a case where it has discretion in the matter.

Even if the respondent is a double-dyed villain, because it did not pay its taxes, and therefore should be thrown to the tax-title sharks, it is rather hard to throw with it fifty citizens of Yakima who have not committed the crime of non-payment of taxes.

The Supreme Court of the United States says in St. Louis *v.* Telegraph Co., 148 U. S., 104:

"It is true that in cases tried by the court, *where all the facts are specially found or agreed to,* it is within the power of this court, in reversing, to direct the judgment which shall be entered upon such findings. At the same time, if for any reasons, justice seems to require it, the court may simply reverse and direct a new trial."

We therefore submit it was wrong to direct a judgment in favor of appellant quieting his title.

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Fifth Ground for Re-argument.

SYNOPSIS OF ARGUMENT.

I.

In order to show that the tax judgment and deed held valid is wanting in the requirements of "due process of law," the argument has been divided, and will be found on the following pages of this brief, as follows:

(1) Inapplicability of the rule of construction relied upon by the court.

(2) The principles laid down by the opinion are violative of the Fourteenth Amendment.

(3) The Federal question involved.

(4) The description in the case presents a case of patent ambiguity.

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First. The Inapplicability of the Rule of Construction Relied upon by the Court.

Under a subsequent head of this argument we shall show that had the question of the sufficiency of the description been raised in the case of a deed made between individuals and given pursuant to an intent of the owner to convey certain property, even in such case a description like the one here would have to be held void for the reasons:

(*a*) That it presents a case of patent ambiguity;

(*b*) That it could not be aided by rules of construction;

(*c*) That no evidence *aliunde* could be introduced in aid of the words of description, and the deed would be held void in a court of law until reformed in equity in a suit for that purpose.

Under this head we shall approach the question from the point of view that the deed in question was made and given by an officer of the law in execution of a statutory power.

In its decision the court arrived at the conclusion of the sufficiency of the description by the application of the well-known rule of construction, "that that is certain which can be made certain." From its own phraseology, the rule relied on carries the suggestion that it allows a consideration of extrinsic facts outside of the description in a given deed, from which the court may "make certain" the doubtful meaning of a description; but it applies to cases of deeds where the intent of parties to a deed plays an important part. It is obvious that the description in question, standing by itself, does not of itself point to specific blocks of land, since no such blocks of land as 352 and 372 appear upon the plat. The elaborate opinion of the court in this case is the best evidence of the necessity of resorting to several inferences of intent on the part of some one to describe

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something before the description in question could be made to apply to the lands described in the complaint. It is only after the court had indulged in the assumption that because "the entire plat fails to show any place for block numbers 352 and 372, except upon the reserved plat," and "because the tract was in the exact location where such numbers would occur in the regular system of numbers employed in the plat," that it arrived at the conclusion as to what was *intended* to be the description. But the fact is, the description was made by the taxing officer and not by this respondent. The property was never known before by such description, and its origin is admittedly due to the arbitrary act of the taxing officer. The description in question could not have been self-created and come into existence without an *intent* on the part of some one to describe something.

There is no escape from the conclusion that before the court can make the description apply to the land in controversy it is necessary for it to assume, as it did in fact assume, that it was the *intent* of the taxing officer, by some process of reasoning of his own, to give the land in question this arbitrary description. But how can the question of what

was intended to be the description by the taxing officer control the disposition of this case?

This is not a suit for reformation of a deed given by the owner of property to another, pursuant to an *intent*, to convey it; neither is this a suit in ejectment, based upon a conventional deed between individuals, where the question of what was *intended* to be conveyed by one or the other plays an *essential* part.

The appellant in this case relies upon a tax deed given by an officer in the exercise of a mere naked power, which must be strictly pursued, and the execution of which can only be shown by the *acts* of the officers themselves, evidenced in the manner prescribed by the statute. The tax deed is the sole evidence of the land conveyed, and no presumptions of what the officer *intended* to convey can be indulged in. From the nature of the tax deed, given in pursuance to a naked statutory power, there can be no presumption of what

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the officers *intended* to convey different from that expressed by their acts. The owner conveys nothing and does not intend to convey anything. It is conveyed against his will in a proceeding hostile against him.

That such is the universal rule in all the States of the Union where a question of this kind has ever come up, is evident from a consideration of the authorities.

Thus in Schattler *v.* Cassinelli, 56 Ark., 172, where, like in this case, an attempt was made to make out a description by trying to fit an ambiguous description by a construction of the plat, the court said, speaking of the inapplicability of the rule relied upon by this court in this case:

"Would she, or any ordinary intelligent and prudent owner in her position, think that a part of her land was to be sold? We think not; and if not, such description is practically no description, since it lacks the first requisite of one—notice to the owner. Yet if the rule be applied, such a sale would be valid, and pass, not the land intended but the land in a parallelogram along the entire line of the tract, includ-

ing a part of her lots. Thus a rule of judicial origin, which was designed to ascertain the meaning of parties, would be employed against one who was a stranger to the description and ignorant that it was intended to apply to his land; the result would be to pass land which no one intended or was authorized to sell, and which persons ordinarily conversant with land descriptions would not expect to be sold. A description which can be understood and made definite only by judicial construction does not accomplish the essential functions of a description in tax proceedings; and as the law requires one to be made for the practical purpose of protecting the owner, any that conveys no certain meaning to persons ordinarily versed as to such matters does not answer the requirement. One which is intelligible only to a high order of legal understanding conveys no meaning to others—the vast majority of taxpayers—and should not be adjudged sufficient as the basis of a tax proceeding or of a proceeding to confirm a tax sale upon constructive notice. As the rule is

of judicial origin, intended to aid in the practical administration of justice, it should not be extended beyond the sphere of its usefulness to a class of cases where it is calculated to work injustice and wrong."

Again, in Jones *v.* Pelham *et al.*, 84 Ala., 208, where the description was only that of a latent ambiguity, the court said:

"The purpose of the statute is, that the description in the assessment should be sufficiently definite and certain to inform the owner that his property is assessed for taxation, and the purchaser at the tax sale, what property he is buying. In the assessment of the lot in controversy, it is described as 'a house and lot on Battle street, in the town of Talladega,' as the property of Pelham. The evidence shows that Pelham owned another house and lot on the same street, in which he resided, and adjoining the lot in question. The description affords no data by which to ascertain what house and lot on Battle street is intended. The assessment is void for uncertainty (Wilkinson *v.* Roper, 74 Ala., 140; Hannell *v.* Smith, 15 Ohio, 134; Blackwell on Tax Titles, 423; Burrows on Taxation, 203). In a conveyance between individ-

uals where the purpose is to explain and give operation to the intention of the parties, certainty may be imparted to the deed by parol evidence that the particular land was designated, and that the grantee was put into possession. But this rule does not apply to tax titles, with which the owner has nothing to do, and there being no intention to which operation can be given. The assessment is the foundation of all subsequent proceedings, and in order to impart certainty and validity to them, the description of the land must be sufficiently definite and certain as not to require resort to extrinsic proof, unless the description in the assessment furnishes the means of more exact identification by the aid of such evidence (Keane *v.* Cannovan, 21 Cal., 291; Driggers *v.* Cassaday, 71 Ala., 529)."

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In Tallman *v.* White, 2 N. Y., 66, the court said:

"In a deed between individuals, a part of the description of the premises conveyed may be rejected on account of its falsity, if after its rejection there is enough left to show clearly what the owner intended to convey. In this case, if the owner of the land had executed the deed, giving the boundaries correctly, the title might have passed, although the land was falsely described as to the village in which it lay. It would then present the question what the owner intended to convey. There is no such question here. The owner conveys nothing, and does not intend to convey anything. If the officers who undertake to convey for him intend to convey lands lying in one place, by a deed describing them as lying in a different place, they intend to do what the statute, under which they profess to act, does not permit. A judicial decision which should sanction a title like the present would open a door to innumerable frauds."

In Zink *v.* McManus *et al.*, 121 N. Y., 259, the court said:

"It would be difficult, even in a conveyance between individuals, to hold that the description contained in the comptroller's deed embraces or sufficiently identifies the land described in the complaint. In proceedings *in invitum*, where public officers undertake to convey, under statutory power, the property of individuals, such a description is fatally defective."

In Wofford *et al. v.* McKinna, 23 Tex., 36, the court said:

"From its terms it is uncertain in what form the lands are to be taken. Neither the owner of the land, the party in possession, nor the court can know, from the face of the deed, what are the boundaries of the claim. The deed manifestly is void for uncertainty in the description of the premises, unless it can be aided by matter extrinsic of itself. If it were a contract or conveyance between individuals, this unquestionably might be done, and effect given to the contract or conveyance. In a contract between individuals, if a latent ambiguity exists in the description of the land, parol evidence is resorted to for the purpose of explaining it and giving effect to the intention of the parties; and where the estate intended to be conveyed is sufficiently described in the

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instrument, the addition of a circumstance, false or mistaken, will be rejected as surplusage in order to carry the intention into effect. But the law in respect to the class of titles to which the present (45) belongs is settled otherwise by the whole current of decisions, both in the Federal and State courts" (Blackwell on Tax Titles, 450, 451, *et seq.*, and numerous cases cited in the text).

"A description sufficiently certain to convey land between man and man, and which, if contained in an agreement to convey, will not answer in the proceedings to enforce the collection of a tax" (Blackwell, 152).

"A grant by the owner of a certain number of acres in a particular tract would confer a right of election upon the grantee, and authorize him to locate the quantity in any part of the tract he saw proper to elect, upon the principle that a conveyance must be held to pass some interest if such effect may be given to it consistently with the rules of law, and that if uncertain or ambiguous it must be construed most strongly against the grantor. But in this respect, it is said, there is a wide difference between the conveyance of the owner and a public officer. The former may sell upon his own terms, and may confer a right of election upon his grantee. But power to grant such a right is not conferred upon the officer of the law. He is the mere instrument to pass the title. He acts under a special and limited authority, conferred by the law, and not by the owner of the estate. In this proceeding the owner 'has nothing to do—he intends

nothing. The government is acting through its agents in hostility to him.' The proceeding is construed strictly; and parol evidence is not admitted to explain a latent ambiguity in the description, or to locate the land. If the description by the officer be not so certain and complete as not to require the aid of extrinsic evidence, his deed is held to be void (Blackwell, 156; 2 Ham., 287; Ewing *v.* Helm, 13 Serg. & R., 151; 13 How., 23)."

In Curtis *v.* The Board of Supervisors of Brown County, 22 Wis., 167, where the ambiguity was one that could easily be reconciled by construction of the plat, the court said:

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"The counsel for the plaintiff are fully sustained by authority and correct in the position, that a false or mistaken description of the land, in proceedings to enforce the collection of taxes, avoids the sale, certificate or deed. The reasons are obvious. The officers are engaged in the exercise of mere naked statutory powers, which must be strictly pursued, and the execution of which can only be shown by the *acts* of the officers themselves, evidenced in the manner prescribed by the statute. The certificate is the sole evidence of the land sold, and the deed, of that conveyed; and hence parol evidence cannot be received to aid or correct a description which is false or mistaken. For the same reason, also, no part of the description can be rejected as surplusage, nor words omitted be supplied as in similar transactions between private individuals. The officers can be presumed to have no intention different from that expressed by their acts. To receive evidence that they intended another description in the place of the one given, or that they sold or conveyed lands lying in one place for those which lie in another, or which have no existence at all, would be to show that they intended to do that which the law under which they proposed to act did not permit, and which was therefore illegal. Another reason why the description in the list, certificate or deed must be adhered to for the purpose of testing the legal validity of the proceedings, is that otherwise the owner of the lands would lose all benefit of the notices required by law to be given in such cases. It would be impossible for him to know, either from the published lists of the assessment-roll that this land had been assessed or sold, or was to be sold or conveyed;

and hence he cannot be considered delinquent in not having paid the taxes, so that his title to the land should be lost or forfeited."

In addition to the foregoing authorities to show the universality of this principle of law, we cite the following cases:

Dike *v.* Lewis, 4 Denio, 237.
Grisman *v.* Furman, 22 Fla., 581.
Jackson *v.* Sloman, 117 Mich., 126.
Miller *v.* Williams, 135 Cal., 183.
Hill *v.* Mowry, 6 Gray (Mass.), 551.

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Clements *v.* Ramull, 34 Mo., 583.
Wooters *v.* Arledge, 54 Tex., 395.
Jackson *v.* Delaney, 13 Johns., 552.
Mitchell *v.* Ireland, 54 Tex., 301.

This view of the question, as shown by the foregoing cases, was evidently overlooked by the court in its consideration of this case.

It is manifest from the language of its opinion that the court has wholly ignored the character of the proceeding on which the tax deed is based.

As we have already shown, the *liberal* rule of construction laid down by Mr. Jones in his work on Real Property and Conveyancing, and cited by the court's opinion, applies only to cases where the intent of contracting parties plays an important part. Rules of *liberal* construction should find no sanction in a court of justice, in any case where an attempt is made to divest a man of his property for an insignificant fraction of its value.

In 1 Cooley on Taxation, p. 913, the author says:

"Sales of real estate for the non-payment of taxes must be regarded in a great measure as an *ex parte* proceeding. The owner is to be deprived of his land thereby; and a series of acts preliminary to the sale are to be performed to authorize it on the part of the assessors and collector, to which his at-

tention may never have been particularly called; and experience and observation render it notorious that the amount paid by purchasers at such sales is uniformly trifling in comparison with the value of the property sold. It has therefore been held, with great propriety, that, to make out a valid title under such sales, great strictness is to be required; and it must appear that the provisions of law preparatory to and authorizing such sales have been punctiliously complied with."

The aspersion cast by the court upon this respondent by charging it with an attempt to evade the payment of taxes can hardly be justified, in view of the facts of the case and the character of this proceeding. As long as there was no legal

obligation imposed upon the land of this respondent, as required by "due process of law," so long there could exist no occasion for evading the payment of taxes. In the anxiety to lend its aid in the enforcement of payment of taxes, the court has swept away the fundamental principles of law, intended for the protection of property-owner. But the duty to pay the tax on the one hand is no more sacred or entitled to more consideration than the protection of the citizen against unnecessary sacrifice of his property. This view of the matter has been ably expressed by the Supreme Court of Massachusetts in the case of Foster *v.* Foster, 129 Mass., 559, as follows:

"While it is doubtless the duty of the citizen to pay all taxes legally assessed upon him for support of the government, yet the validity of the proceedings taking his land against his will, in discharge of his tax, depends upon *no consideration of equity,* but upon a strict compliance with the regulations previously prescribed by statute for the *double* purpose of securing the payment of the tax and of *protecting the citizen against unnecessary sacrifice of his property.*"

See also 1 Cooley on Taxation, p. 452 (3rd ed.).

So jealous of property rights is the spirit of our jurisprudence, especially in cases where property is taken for a tax, that books are filled with cases showing a uniform leaning toward strictness of construction of all tax proceedings.

1 Cooley on Taxation (3rd ed.), p. 912 *et seq.*

We beg to submit, therefore, that to apply the rule of *liberal* construction in this case is to violate the very foundations of the law of private property.

Second. The Principles Laid Down by the Decision are Manifestly Violative of the 14th Amendment of the Federal Constitution, Requiring "Due Process of Law."

The tax proceedings in this State under the law of 1897, as amended, under which the tax deed is made, have been over and over again held by this court to be proceedings *strictly* and *purely in rem*, in the sense that—

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(*a*) No notice to the true owner was essential to jurisdiction;

(*b*) That the jurisdiction is acquired over the property of the owner by publication of the notice describing the property;

(*c*) That it is not necessary to name the true owner as party defendant, nor to serve him with notice;

(*d*) That the proceeding is strictly against the property and not the individual.

Such is the settled doctrine of this court, as the following cases will demonstrate beyond a cavil of a doubt:

Williams *v.* Pittock, 35 Wash., 271.
Woodward *v.* Taylor, 33 Wash., 1.
Spokane *v.* Abitz, 80 Pac., 192.
Carson *v.* Titlow, 80 Pac., 299.
Allen *v.* Peterson, 80 Pac., 849.
Dalun *v.* Jones, 79 Pac., 640.
Rowland *v.* Eslund, 82 Pac., 599.

Having thus committed itself to this doctrine, the court has wholly done away with the necessity of actual notice to the true owner. All that was required was a notice by publication describing the property, irrespective of whether the true owner is actually notified or not.

It should be borne in mind that the question of the sufficiency of a legal description in the deed is not confined solely to the deed itself, but reaches back to the notice and summons, as well as the tax-foreclosure judgment. It is manifest that if the description in the deed is held sufficient, it must also be so held in the notice and summons, and *vice versa*—in fact, it is so held in this case.

By the decision in this case the court has gone a step further. It now plainly holds that any description of property which, by the use of most liberal rules of construction, carried to its furthest limits, can be spelled into a description that will fit a piece of property, is sufficient. It would be manifestly subversive of the spirit of "due process of law" to so further relax the essentials of a notice to the owner as to hold that even in a tax proceeding strictly *in rem* an accurate description of the *res* (the defendant) is not essential; and that all that is required is any description which any taxing officer may see fit to adopt, provided the court may,

by the use of most liberal rules of construction, carried to their furthest limits (and wholly inapplicable to tax proceedings), spell out an intent on the part of the taxing officer to describe the particular property. To do all this, for the sake of sustaining a tax deed which deprives a man of his property for a fraction of its value, is a rank confiscation of private property under guise of judicial sanction.

The danger of the doctrine laid down in this case lies in the fact that it sweeps away the last safeguard left in the tax laws of the State, intended for the protection of the property-owner, relating to notice describing property intended to be sold. If the decision here is adhered to, its principle leaves

it in the power of the taxing officers to describe a given tract of land in any way they please, providing they can afterwards show what particular property they *intended* to so arbitrarily describe, irrespective of the question whether such arbitrary description can stand the test of the applicable rules of construction or not.

If, as it must be admitted, a tax proceeding in this State is "purely *in rem*—that is, against the *res*—and the *res* is the only necessary defendant to give jurisdiction to the court, is it not clear that, to subject the *res* defendant to the jurisdiction of the court, it must be pointed out and so clearly designated in the proceeding as to leave no doubt on the face of the description what property actually was described?

That the *res* in this proceeding was not clearly designated, the opinion of the court is the best evidence, since the court, in order to arrive at the conclusion that the description of the *res* was sufficient, had to resort to several assumptions, which we shall hereinafter show were wholly unauthorized by any applicable rules of construction. Suffice is to say, for the purpose of this discussion, that the description in question conveyed no such meaning to the lower court, an admittedly impartial tribunal. Can a description of property upon the meaning of which there is such a decided conflict of opinion, even between the two courts, and which can be understood

only by *judicial construction* of a higher court, accomplish the essential function in a tax proceeding, where the office of the description is to impart notice? The answer to this proposition is found in the language of the court in Schattler *v.* Cassinelli, 56 Ark., 177:

"A description which can be understood and made definite only by judicial construction does not accomplish the essential functions of a description in tax proceedings; and as the law requires one to be made for the practical purpose of protecting the owner, any that conveys no certain meaning to persons ordinarily versed as to such matters does not answer the requirement. One which is intelligible only to a high

order of legal understanding conveys no meaning to others—the vast majority of taxpayers—and should not be adjudged sufficient as the basis of a tax proceeding, or of a proceeding to confirm a tax sale upon constructive notice."

To illustrate the fallacy of the doctrine laid down in this case, we ask the court's attention to the elementary principles of "due process of law," as applied to action strictly *in personam*. In an action for debt against John Smith, the plaintiff erroneously names him in the complaint and summons as "George Brown," but the summons is actually served on John Smith, the *intended* defendant. If he, John Smith, fails to appear, would a judgment by default be valid against *him* (John Smith), although in form it is entered against George Brown? Certainly not. In such case the court acquires no jurisdiction (where no appearance is made) over the person of John Smith, for the obvious reason that he is not the party required by the summons to appear. In such a case the fact that John Smith was actually *intended* as the defendant and was served, and so had actual notice, would not confer jurisdiction, if he made no general appearance in the case, because *John Smith* was not named in the summons, and there could be no presumptions indulged in that he was the party intended.

Farnham *v.* Heildress, 32 Barb., 277 (per Allen, J.).
Cale *v.* Hindson, 6 T. R., 234.

This illustration shows that something more than mere

actual knowledge of the pendency of a proceeding in court is necessary to confer jurisdiction even in an action *in personam*, where service must be personal. If such be the law in actions *in personam*, how much stricter should the rule be in a tax proceeding strictly *in rem*, where the law permits the taking of private property for a small fraction of its value, upon a mere *constructive* notice by publication and where no personal notice to the owner is intended to be given?

The mere knowledge on the part of the respondent that the description in question was intended to apply to this land is of absolutely no significance, since the jurisdiction of the court over the property does not depend upon whether the owner has notice or not, but whether the property is accurately described. So little has the actual knowledge to do with the case that even the owner's consent to a defective publication is insufficient. Mr. Cooley, on page 936 (3rd ed.), in this connection lays down the rule as follows:

"Consent of the owner of land to a defective publication of notice, it has been held, would not bind him, as he cannot, in that manner confer an authority upon an officer of the law, nor can he pass a title to his freehold by mere waiver."

It would be useless to cite the vast number of cases in which it is uniformly held that the description in the publication of notice or summons must be an adequate and accurate description of the lands. Some of them are found collected in Black on Tax Titles, under section 208, where the author sums up the universal doctrine in this way:

"One of the most important requisites in the notice of advertisement is, that it should contain an adequate and accurate description of the lands to be sold. If this is omitted, or if the description given is insufficient and imperfect, the notice is fatally defective and the tax sale void. * * * And it is said by a high authority 'It is not sufficient that such a description should be given in the advertisement as would enable the person desirous of purchasing to ascertain the situation of the property by inquiry. Nor, if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, yet the sale would be void, unless the same information had been communicated to the public in the notice. Its defects, if any

exist in the description of the property to be sold, cannot be cured by any communications made to bidders on the day of sale by the auctioneer.' But surely these last views do not go far enough. To inform intending purchasers is indeed one of the reasons for requiring a description in the notice, but

it is not the only one. Another reason is, to call the attention of the owner to the jeopardy to which his interests are exposed. Nor is the owner alone concerned in the sufficiency of the notice. But it may be even more important to mortgagees, or others, whose interests or liens might be divested by a tax sale of the property. It is certainly one of the functions of the advertisement to advise such persons that the property in which they are interested is going to sale for taxes. And it is very possible that this might not be accomplished by a notice which would very well serve its purpose with respect to the owner and to intending purchasers. Therefore the plain necessity of the case seems to demand a more stringent rule, in this regard, than that which would be satisfied with a description which was merely not calculated to mislead the owner."

See also Cooley on Taxation (3rd ed.), p. 395.

Such being the universal rule as to the necessity of certainty and accuracy of description in order to impart notice, the question whether the description under consideration contained in the notice and tax deed constitutes "due process of law" is really the most important question in this case. It is evident from the opinion that in deciding this case it has not occurred to the court to consider it from that point of view. Looking at it from the constitutional point of view, the question should not be answered by the application of mere rules of liberal construction. The tests to be applied are well stated by Mr. Cooley in his work on Constitutional Limitations (6th ed.), page 434, as follows:

"When the Government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our sys-

tem of laws, and not generally by rules that pertain to forms of procedure merely. * * * Due process of law in each particular case means, such an exertion of the powers of gov-

ernment as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one question belongs."

C., B. & Q. Ry. *v.* Chicago, 166 U. S., 226, p. 241.

The same result is reached by another process of reasoning.

It is undisputed that the respondent acquired perfect title to the land in question, and that if it has been divested of such title it was by the tax proceedings under which appellant claims.

Appellant claims under a tax deed issued pursuant to a judgment of the superior court foreclosing a tax certificate.

Since a tax deed can issue only pursuant to a judgment, and because of it, it follows that a tax deed issued without any judgment is a nullity. A judgment entered by a court without jurisdiction—that is, without power to enter it—is of course void, and, if void, it is a nullity everywhere and in every court.

Therefore the first and chief question to examine in the consideration of any tax deed issued under the statutes of Washington is, Did the court entering the judgment have power to enter it? That is, did it have jurisdiction over the general subject-matter, viz, the foreclosure of tax certificates; and, if so, did it bring before it the persons and things involved in the particular tax proceeding?

There is no question but that the foreclosure of tax certificates is given by statute to the superior court; therefore the only question is, Did the superior court acquire jurisdiction of the particular property here involved?

This court has repeatedly adjudged, so that it is now set-

tled law, that the foreclosure of a tax certificate under the statute is a proceeding *in rem*.

To determine the jurisdiction of the court, we must examine—

(*a*) The sufficiency of the process by which the foreclosure was commenced;

(*b*) The sufficiency of the service of such process.

It therefore appears that legal principles applicable to the construction of deeds of real estate have nothing to do with this case. The fundamental question in this case is the sufficiency of the process by which the foreclosure of this tax certificate was commenced. Did such process constitute due process of law so as to bring before the court the property involved? If it did, the judgment is conclusive, even though the court committed error in rendering it. If it did not, the judgment, and therefore the deed, is a nullity.

It is evident that the sufficiency of a legal process does not depend upon the same legal principles as does the sufficiency of a deed between two private individuals, nor even that of a tax deed issued in an administrative proceeding without any judgment of court.

It is the construction, not of an agreement between two individuals which conveys land from one to the other, but of the process of a court, which reaches out and brings before the court individuals and things. What the parties to a deed intended to convey is of course material. But whom or what the officers of a court intended to reach by a process is wholly immaterial. The only question in such case is, *Did* the process reach and bring before the court the person or thing which it was sent after? That is to say, was the process the kind that the law requires, and was it served in the way that the law requires? If it failed in either respect, it accomplished nothing, and it can in no way be helped out by the intention of the officer issuing it or the knowledge of the party for whom it was issued that he was the person whom the court intended to reach.

In this tax foreclosure, did the court bring before it the parties to the proceeding? It is the settled law of this State, that a proceeding to foreclose a tax certificate is a proceeding strictly *in rem*.

Each class of cases has its due process; what is appropriate to one may not be appropriate to another.

Waples on Proceedings *in Rem*, Sec. 23.

Therefore it is important, in determining what kind of notice would constitute due process of law in any proceeding, to ascertain what notice has always been required and deemed essentially necessary in actions or proceedings of that kind according to that system of jurisprudence of which ours is derivative. This is well illustrated by the fact that in an action *in personam*, it is not due process of law to authorize a court to acquire jurisdiction over a resident by seizure of his property and notice served by publication.

Pennoyer *v.* Nebb, 95 U. S., 727.

Bardwell *v.* Collins, 44 Minn., 102.

But such procedure is due process of law, even as against a resident in a proceeding *in rem*.

Allen *v.* Peterson, 80 Pac., 849 (Wash.).

Chauncey *v.* Wass, 35 Minn., 23.

Pennoyer *v.* Neff, 95 U. S., 727.

It is elementary that seizure of the *res* is the initial step in proceedings *in rem*.

Waples on Proceedings *in Rem*, Secs. 42 & 43.

"The seizure of the *res* and the publication of the monition or invitation to appear is regarded as equivalent to the particular service of process in the courts of law or equity," and where judgment is rendered without such seizure, it is void.

Taylor *v.* Carryl, 20 How., 599.

The essentials of proceedings *in rem* are two:

1st. The suit is always against a thing, not a person.

2nd. All the world are parties to the suit.

It therefore follows that if the process is not sufficient to bring into the court everybody, it does not bring in anybody (though, of course, any one who voluntarily appeared would be concluded by the judgment).

This is so because, since the process runs to all the world, it must be sufficiently definite and certain to give notice to all the world of the particular property which the court has seized and the title to which it proposes to transfer by its judgment.

If it does not do this, it is not due process of law for proceedings *in rem*, and therefore even those persons who know what the notice was intended to mean may ignore it, because it is not the notice which the law requires.

We of course admit that in the proceedings in question the seizure can be constructive, and that the service can be by publication, but we insist that the sufficiency of the seizure as well as the service of the process depends upon the proper description of the land in the notice by which the proceedings to foreclose were commenced, because the State requires such notice to contain "the description of the property" which it is proposed to seize and take from its lawful owner. If it did not require such description, the statute would be unconstitutional, and any judgment under it void.

Bearing in mind the nature of the proceedings *in rem*, viz., that they bind all the world, it follows that "the description of the property" which the statute requires is a description which all the world can understand. If one man, or a dozen men, or a whole community, understands it, but the world at large does not understand it, the process is insufficient, and therefore binds no one who does not appear in the proceeding. So that where, by a local usage, the meaning of a description was known to an entire community, it was nevertheless held bad, because its meaning was not generally known. The court said:

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"We are of the opinion that the attempted description in the second column is fatally defective. As is found in this

case by the court below, there may be local usage in that part of the State where the judgment was entered, according to which this description would be understood to mean the south half of the northeast quarter and the northwest quarter of the southeast quarter, but there is no general usage of this kind. Neither is this the import of the letters and figures employed, according to the common and ordinary usages of the English language, as the same is spoken and written in this State or in general nor as it is used in the judgments of courts.

"It would never do to hold that judgments of domestic tribunals may be explained by experts, or by proof of the local meaning of their language. This would introduce infinite confusion and uncertainty where clearness and certainty are of capital importance. A domestic judgment must speak for itself, and the courts must be able, by reading it, to determine what it means, without other aid than a knowledge of the ordinary and usual meaning of the words and characters employed, as the same are used in judicial proceedings. Tried by this rule, the attempted description in the judgment in question, as a description of any particular parcels of land, describes nothing. The judgment upon which the plaintiffs' tax title is based is, therefore, upon its face, of no effect whatever, for no argument can be needed to show that a real-estate tax judgment, which does not designate or identify some particular parcel of real estate against which it is rendered, is no judgment at all. In other words, lacks a subject, and therefore adjudges nothing."

Keith *v.* Hayden, 26 Minn., 213.

So where the plat failed to show the lot described in the proceedings, the judgment was held void.

Williams *v.* Central Land Co., 32 Minn., 442.

So where the description had to be helped out by supplying the word "of" and punctuation marks.

Knight *v.* Alexander, 38 Minn., 387.

In Davis *v.* How, 52 Minn., 157, the description was

	Lot.	Block.
S. W. ¼ of S. W. ¼.....	3	4

and was held bad, though in a preceding township the headings over similar columns of numerals were "Sec." and "Acres."

The court said (page 158):

"We do not think the land-owner was called upon to interpret the description, or refer or connect it with that of the preceding town."

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We have quoted from the Minnesota decisions for two reasons:

1st. When the Washington legislature changed the procedure for the collection of taxes from an administrative to a judicial proceeding, it largely copied *verbatim* the statute of Minnesota for the collection of delinquent taxes, and under a familiar rule of law it thereby adopted the construction which the Minnesota courts had placed on such statute.

2nd. There are very few jurisdictions outside of Minnesota in which the validity of a tax title is made to depend upon a proceeding *in rem*, and none in which the subject has been so often considered, probably because it was one of the first States to adopt this procedure, and therefore has many authorities in point.

"A description in tax proceedings, the use and understanding of which is confined to the locality in which the land lies, is not sufficient."

Cooper *v.* Lee's Heirs, 27 S. W. Rep., 970; 59 Ark., 460.

We are aware of no rule under which a court could properly reject anything contained in the notice, or add anything thereto for the purpose of curing its defects. The notice being deficient, the court had no jurisdiction to render judgment against the land, and it therefore follows that the tax sale is void.

Pickering *v.* Lomax, 120 Ill., 289; 11 N. E., 179.

Having shown that by the universal holdings of all the courts of the Union that the description in question would be held insufficient to impart notice, we submit that it does not constitute "due process of law" under the 14th Amendment of the Federal Constitution, and that before the court adheres to its decision in this case, it should grant a rehearing upon a question of such vast importance.

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Third. The Federal Question.

The judgment of this court is not "due process of law," and the question whether it is or not is a Federal one.

Under this head we ask the court to allow a rehearing upon the Federal question of "due process of law." This question was not presented on the argument of the case, and has arisen solely because of the adverse decision of the court in this case, which was a surprise to respondent.

That some kind of notice in a proceeding *in rem* is essential under the Fourteenth Amendment has been held in—

Windsor *v.* McVeigh, 93 U. S., 274.
Hassel *v.* Wilcox, 130 U. S., 493-504.

It is our contention that the judgment of this court in this case amounts to taking of private property without due process of law.

The Fourteenth Amendment of the Federal Constitution extends not only to legislative enactments, but also to final judgments of the State courts.

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Scott *v.* McNeal, 154 U. S., 34.
Chicago *v.* R. R. Co., 166 U. S., 226.

Hence the record clearly presents a Federal question. We ask the court to consider, therefore, whether, in view of the authorities cited, this court could say that the description in

the tax deed and summons in this case is so sufficient as to answer the requirements of the 14th Amendment.

In other words, the question is: Is the notice and summons containing a description which can only be made certain by indulging in inferences and assumptions such a *reasonable* notice as not to violate the requirements of the 14th Amendment?

The question of *reasonableness* of notice is a Federal question.

Scott *v.* McNeal, 154 U. S., 34.
Roller *v.* Holly, 176 U. S., 398.
Bellingham *v.* Whatcomb, 172 U. S., 318.

It is our contention that under the authorities cited under heading II of this brief the notice and summons in this case is so *unreasonable* as to violate the requirements of the 14th Amendment.

We claim that under the Federal authorities a notice to be sufficient (in respect here contended) should contain an accurate description of the property, so that on its face any person of ordinary intelligence could understand what property was described.

In this respect we quote from the opinion of the United States Supreme Court in Bellingham *v.* Whitcomb, 172 U. S., 314, from page 318, where, speaking of what the 14th Amendment requires of a notice, it says:

"The purpose of the notice is to secure to the owner the opportunity to protect his property from the lien of the proposed tax or some part thereof. In order to be effectual it should be *so full and clear* as to disclose to persons of *ordinary intelligence* in a general way what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property,

will receive the information of what is proposed and when and where he may be heard."

We claim in the language of the Supreme Court of Arkansas (56 Ark., 172, on p. 178) that "a description which is intelligible only to a high order of legal understanding, conveys no meaning to others," and it is "not so *full* and clear as to disclose to persons of *ordinary intelligence* what is proposed," and, therefore, violates the requirement of the 14th Amendment.

It is clear from the consideration of the foregoing authorities that the question of "due process of law" is fairly and squarely presented by the facts of this case, and this respondent is in right and justice entitled to a rehearing of the case, so that the court may consider the case from the point of view of the 14th Amendment of the Federal Constitution before its judgment deprives it of its property.

Under a heading immediately following this one we show to the court that the description involved in this case is void on its face, even if it were involved in a deed between individuals. If we are correct in our claim that such description is absolutely void, it seems that no further argument would be required for the proposition that a void description can never be sufficient to impart the kind of notice required by "due process of law."

Fourth. The Description in This Case Presents a Patent Ambiguity.

Under the first head we considered the question of sufficiency of description from the point of view of a tax deed. We shall now endeavor to convince the court that even in a deed between individuals, given pursuant to an intent to convey private grantor's property, the deed is void on its face. In the first place, it is clear that the maxim "that is certain which can be made certain" applies only to cases of latent ambiguities and never to cases of *patent* ambiguities.

Jones on Law of Pr. and Co., Sec. 337-338.

If this is not a case of *latent* ambiguity, surely the ambiguity is *patent,* and the description is void.

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(Jones, Sec. 337-338.)

(All references to "Jones" are to "Jones Law of Real Property and Conveyancing.")

What, then, is a *latent* ambiguity?

"A latent ambiguity occurs when the description appears *sufficiently certain,* but when applied to the land, it appears that the words of description are applicable to two or more different things, and there is nothing in the deed to show which is meant."

Jones, Secs. 338, p. 283.

The court will observe that an important characteristic of a *latent* ambiguity *always* is, that the description *itself* is *certain,* but the difficulty lies in ascertaining the particular land to which it was intended to apply. An illustration of such ambiguity is, for instance, where a testator devises his Manor of Dale, and it is found that he had at the date of his will two manors, *North* Dale and *South* Dale. Evidence may be adduced to show which of them was intended, upon the principle of "that is certain which can be made certain."

But the very foundation of the rule relied upon by the court in this case ("that is certain which can be made certain") is the fact that the deed itself must contain a certain item of description, which is in itself *certain* and not *ambiguous* (Jones R. P. & C., Secs. 339-343).

An illustration of the essential element of the rule may be found in a vast number of cases, but for the purpose of this argument we will ask the court to consider the case of Brown *vs.* Guice, 46 Minn., 299, where the description was "a part of section 18, in township 7, of range 2 east, containing 180 acres." The court held description void, saying:

"In the case under consideration, the counsel for the appellant has invoked the maxim *id certum est quod certum reddi potest.* This cannot avail him, for the reason that there is nothing in the deed, or referred to therein, by which it can be rendered certain. In the case of a deed, the office is twofold: First, rightly to name the grantor and the grantee; and, secondly, to comprehend the certainty of the

lands or tenements to be conveyed by the deed, and this may be done either by express words or by words which may by reference be reduced to a certainty, according to the principle above invoked. So a grant shall be void if it be totally uncertain; but, if the grant refers to another thing which is certain, it is sufficient."

So in the case of Jennings *v.* Brizeadine, 44 Mo., 332 (a case exactly like this), the land described in the deed was lot "46" in a certain addition, the plat of which showed, as in this case, that no lot was numbered 46. The court held the description void, saying:

"The first objection that will be considered is the action of the court in admitting parol testimony to show that block 46 was intended by the description 'lot 46.' The rule is that to render a deed or other instrument void for uncertain description, the ambiguity must be patent and appear on the face of the instrument; but where the uncertainty is raised by matter outside of the instrument, the ambiguity is latent, and may be explained by the application of extrinsic evidence (Hardy *v.* Matthews, 38 Mo., 121, and cases cited). 'A latent ambiguity,' says Sugden, 'is that which seems certain and without ambiguity for anything appearing on the face of the instrument, but there is some collateral matter out of the instrument that breeds the ambiguity; and, as it is raised by extrinsic evidence, it may fairly be dissolved by the same means.' Where words apply equally to different things or subject-matters, evidence is admissible to show which of them was the thing or subject-matter intended. If, in a deed conveying premises, the description is certain, parol evidence of the intent, the act, and declarations of the parties, going to establish a different location or another designation, is inadmissible, as contradicting or varying the

deed. Courts are to so construe the words of a grant, if possible, as to give effect to it, if it be plain that the parties intended it as an effective conveyance. In the construction the expressed will of the parties is to control. If this be plain upon the face of the instrument, courts are to go further, though the words used frustrate the grant itself. * * * In this case the description is plain, explicit, and certain. The deed of trust conveys lot 46. Were it shown that there were two lots in Chillicothe numbered 46, then a

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latent ambiguity would arise, which might be used by extrinsic evidence, and it would be competent to prove by parol testimony which lot was intended. But it is not pretended that such a state of facts exists. The plat shows that Chillicothe is laid off in blocks and lots, none of which lots are numbered as high as forty-six; and when a deed is clear and precise, and conveys a lot, its terms cannot be varied or altered so as to show that a block was thereby intended. If the description was inaccurate and failed to express the intention of the parties, the plaintiff should have applied to the grantor, or in case of his refusal, to a court of equity, to have the deed reformed and the mistake corrected. The court therefore erred in overruling the defendant's objections admitting the parol evidence."

The application of the general rule invoked by the court is attended by the following necessary and unalterable qualifications, which never have been and never can be departed from without a downright violation of the elementary principles of law:

1. While parol evidence is admissible to apply the description to the parcel of land intended to be conveyed, when the terms used in the deed leave it uncertain what parcel was intended, such evidence cannot be used to *enlarge* the *scope* of the *descriptive words*, but only to fit them to the land intended to be described (Jones, Sec. 339).

2. The description itself must point to the source from which evidence *aliunde* to make description complete is to

be sought. This may be done by the use of a single word, as, for instance, where the description is "*my* farm" or "*my* homestead" (Jones, Sec. 339).

3. "There must be something in the deed to suggest the possibility of locating the land, and the description itself must be sufficient to afford a basis for admitting parol evidence to identify the land" (Jones, Sec. 344).

4. A grant will be held void for uncertainty when, after resort to oral proof, the parcel is still uncertain and it remains a matter of conjecture what was intended (Jones, Sec. 353).

The rules thus laid down all have reference to admission

of oral testimony to explain a *latent* ambiguity, and it may be pertinent to inquire what place they have in this discussion, since the court's opinion is arrived at by process of construction. The object is twofold: First, to demonstrate that the ambiguity in question is not latent; secondly, to apply the above rules to the facts assumed by the court.

While apparently basing its conclusion by process of construction, the court has erroneously assumed certain *facts*, or inferences of facts, the admission of which flatly violates the very rule laid down by the court. The fact is that on the plat there are no such blocks as 352 and 372. By assuming that if the "reserved" tract was platted the blocks in question would be in the *exact* location where such numbers would occur in the regular order and system of numbers the court admittedly resorted to a mere *conjecture* of the following inferences, of which no evidence could be given, under the elementary rules of evidence:

1st. That the "reserved" tract, if platted, would necessarily be platted in such a manner that the streets and alleys would intersect it by projecting the same through said reserved tract.

2nd. That, if platted, the blocks in question must *necessarily* be numbered blocks 372 and 352, respectively, and necessarily be named as a part of Capital Addition.

3rd. That the tax deed on its own face contained words of doubtful meaning, which could convey no other legitimate inference than the inferences indulged in by the court. None of the inferences so made are authorized by any rules of evidence. The best and primary evidence of what was meant by the description is the tax deed taken in connection with the plat of Capital Addition. As admitted by the court in its opinion, no such numbered blocks appeared upon the plat, and the tax deed itself gave no clue or word to what particular part of land it applied, except in words "Blocks 352 and 372, Capital Addition to North Yakima." If the description in the tax deed itself had been "that part of the Capital Addition, marked 'Reserved' on the plat of said addition, which would be included in blocks 352 and 372, if said reserve tract was platted, and all blocks on said addi-

tion consecutively numbered," or some other equivalent description, then the court would be justified in applying the rule "that is certain which can be made certain," because in such case it would appear: First, the *description itself* points to the source from which evidence of identification of the land might be furnished; second, because in such case oral evidence would tend to *explain* the descriptive words of expression contained in the deed, and not contradict, vary, or enlarge them; third, because in such case, after resort to oral proof, there could be no doubt that the words of description could apply to no other tract of land (Jones, Sec. 353); fourth, because in such case the parol evidence would not make a new description, but merely explain the doubtful meaning of the descriptive words themselves.

But the opinion of the court flatly violates every one of the cardinal rules of construction.

In the first place, the deed itself contains no words which by themselves suggest the inference that anything else was intended to be described than merely blocks 352 and 372. There are no words in the deed or in the plat containing the remotest suggestion of "pointing the source from which evidence *aliunde* is to be sought. To hold that the mere presence of a "reserved" tract of land which has not been divided into blocks, or intersected by streets or alleys, without anything else of itself sufficient to justify the inference drawn by the court, is certainly not sufficient to *explain* the already plain description, but to add to it, enlarge its scope, and in effect make an entirely new description, which is grossly violative of the first rules above referred to.

Again, to say that it unmistakably applies to the tract in question is to supply words to the tax deed which are neither expressed on its face nor suggested by any of its language or the plat, which also is grossly violative of all the rules above referred to requiring the deed itself to point the source from which evidence *aliunde* can be sought (Jones, Sec. 339).

We have discussed the question in order to determine whether the case presents a question of *latent* ambiguity, and we submit that under the cardinal rules of construction

applicable here the conclusion of the court cannot be justified if the case is treated as one of *latent* ambiguity.

The fact is that even after resorting to the wholly unauthorized assumptions of fact it would still admittedly remain a matter of *conjecture* whether the description "blocks 352 and 372" applied to the land in controversy, or whether a mistake was made in the description by describing impossible blocks, instead of some other blocks which are actually numbered upon the plat. That being so, the rule which applies here in full force is thus stated by Mr. Jones in Sec. 353:

"If after record to oral proof, the parcel is still uncertain, and it remains a matter of conjecture, what was intended by the instrument, the grant will be held void for uncertainty."

Even as between individuals such description would be so absolutely bad that no evidence of *intention* of grantor could be received to explain the deed. Mr. Jones thus lays down the rule (see Sec. 336):

"Proof of the intention of the grantor is inadmissible to explain a deed which is on its face void for uncertainty, or to enlarge or change the meaning or import of the words used in the deed. When the parties have reduced their contract to writing in the form of a deed, this is taken to be the final expression of their intention, and extrinsic evidence cannot be employed to show that their intention was different from what is expressed on the face of the deed. If the land intended to be conveyed can be ascertained from the deed itself, by rejecting a part of the description manifestly false, resort should not be had to extraneous evidence. A grantor is not allowed to contradict his deed or to vary the description of the land thereby conveyed."

The fact is that the description presents a clear case of *patent* ambiguity.

A patent ambiguity is an ambiguity apparent on the face of the instrument itself.

"An ambiguity which is patent on the face of the deed renders the instrument void" (Jones, Sec. 337).

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Does the ambiguity description in this case appear upon the face of the deed? If it does, there can be no question of its nullity under all the authorities.

The reason for holding void an instrument which contains a *patent* ambiguity has thus been stated by Lord Bacon and has been universally followed by all the courts to the present day where common law prevails:

"*Ambiguitas patens* cannot be helped by averment, for the reason that the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of the lower account, in law, for that were to make all deeds hollow and subject to averment, and so, in effect, to make that pass without deed which the law appoints shall not pass but by deed, and this rule applies not only to deeds, but to written contracts in general" (Broom's Legal Maxims, 584), and which is well explained by the court in the case of Brown *v.* Guise, 46 Miss., 302, as follows:

"The general rule of law upon the subject is, that a latent ambiguity may be removed by means of parol evidence, but that such evidence is inadmissible to explain an ambiguity apparent on the face of the instrument. Patent ambiguities are to be dealt with by the court alone. But where the meaning of an instrument becomes uncertain, by reason of extrinsic evidence, it is for the jury to determine it. By patent ambiguity must be understood an inherent ambiguity, which cannot be removed, either by the ordinary rules of legal construction, or by the application of extrinsic and explanatory evidence, showing that expressions *prima facie* unintelligible are yet capable of conveying a certain and definite meaning. Where the law for reasons of policy requires written evidences, to admit oral testimony in its place, would be to subvert the rule itself. The same observation applies where the law prescribes a certain form of written evidence. To allow a defect in the instrument to be supplied by oral evidence would be *pro tanto* to dispense with the law. Hence, in general, where the law requires a formal, written document, if the document offered in evidence be defective, so that it cannot operate without collateral aid, the defect can-

not be supplied by oral testimony. As oral evidence is inadmissible for the purpose of supplying an omission in an instrument where written evidence is required by law, so it is inadmissible to give any effect to a written instrument which is void in law for inconsistency, repugnancy or ambiguity in its terms, for if a meaning could be assigned by the aid of extrinsic evidence, to that which was apparently destitute of meaning, or if the same instrument could be made to operate

in different ways according to the weight of oral evidence, it is plain that the effect would depend, not upon the instrument, but upon the force of the oral evidence, and thus the latter would virtually be substituted for the former. Hence it will be seen that, according to these principles, parol evidence is never admissible to explain an ambiguity which is not raised by extrinsic facts. Thus, upon a devise to one of the sons of J. S., who has several sons, evidence is not admissible to show that one in particular was meant, and the devise is void for uncertainty. Starkie on Ev., 654."

It must not be assumed for a moment that the ambiguity in this case is not patent, because the description is complete and perfect *on the face of the deed*, but it becomes ambiguous only when read in connection with the plat of Capital Addition.

"It is a well-settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, *with all its notes, lines, descriptions and landmarks*, becomes as much a part of the grant or deed by which they are conveyed, as if such descriptive features were written out upon the *face of the deed* or the grant itself."

Jones on Real Property & Conv., Sec. 424.
Dolder *v.* Volecki, 49 Mo., 98.
Cragin *v.* Powell, 128 U. S.
Noonan *v.* Lee, 2 Black, 499, 504.
Hardin *v.* Jordan, 140 U. S., 371, 380.
County of St. Clair *v.* Lovingston, 23 Wall., 46, 63.

It is clear, therefore, that, the plat being as much a part of the description in the deed as if it was written on the face of the deed, the *ambiguity* appears on the *face* of the instrument, and is therefore void on its face under all the authorities.

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It is needless to add that if the description is void in that respect it cannot be held sufficient to impart notice in a tax proceeding, since if it is void for one purpose it is void for any purpose whatsoever.

On behalf of the respondent, and many others affected by the decision in this case, we ask that the court grant a rehearing because of the manifest injustice of the decision as it now stands.

E. B. PREBLE,
Attorney for Respondent,
North Yakima, Wash.

Dated November 17th, 1906.

W. W. BILLSON AND
A. L. AGATIN,
Of Counsel, Duluth, Minn.

Indorsed: State of Washington, Supreme Court. The Ontario Land Co., respondent, *v.* Jay Yordy *et al.*, appellants. Brief on behalf of The Ontario Land Co. on petition for re-argument. Filed Nov. 24, 1906. C. S. Reinhart, clerk. A. L. Agatin, W. W. Billson, of counsel for respondent.

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STATE OF WASHINGTON, *County of Thurston, ss:*

I, C. S. Reinhart, clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct copy of the brief in support of the petition for rehearing now on file in the above entitled cause and as the same was filed on the 24th day of November, 1906.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 7th day of March, 1908.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

[Endorsed:] File No. 20,663. Supreme Court U. S., October Term, 1907. Term No. 277. Ontario Land Co., pl'ff in error, *v.* Jay Yordy *et ux.* Certified copy of brief in support of petition for rehearing in Supreme Court of the State of Washington. Rec'd Mar. 26/08.